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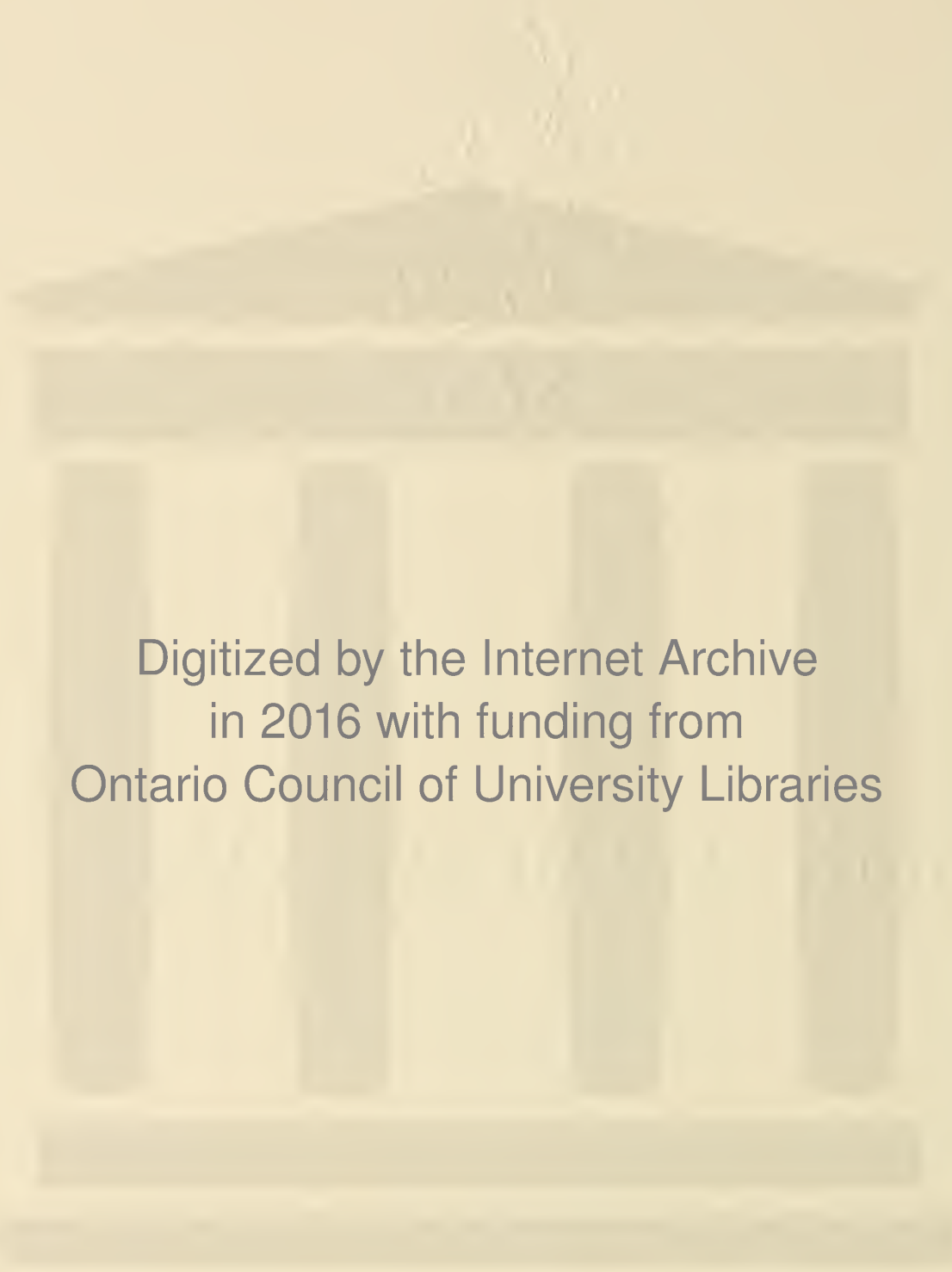

INTRODUCTION

Volume II is devoted entirely to detailed summaries of cases where the recommendation of the Ombudsman was denied by the governmental organization.

Tables of recommendations outstanding from previous reports are included as appendices.

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DETAILED SUMMARY NO. 1

This complaint against the Ministry of Consumer and Commercial Relations was formally made when the complainant wrote to our Office on March 4, 1981. The complainant had first written to our Office on September 15, 1980.

On March 18, 1981, Mr. Donald R. Morand, then Ombudsman, wrote to advise Mr. D. A. Crosbie, Deputy Minister, Ministry of Consumer and Commercial Relations, of his intention to investigate this complaint concerning the Ministry's failure to honour certain commitments made to the members of a Homeowners' Association, on whose behalf the complainant was acting. Mr. A, the Executive Director of the Business Practices Division, responded by letter dated April 1, 1981 with his view of the matter.

Following our investigation into the matter, the Temporary Ombudsman wrote to Mr. Crosbie on September 21, 1983, pursuant to the provisions of section 19(3) of the Ombudsman Act, to advise Mr. Crosbie of the possible conclusions and recommendations he might make with respect to the complaint.

By letter dated December 16, 1983, Mr. Crosbie responded to the Temporary Ombudsman's letter. The representations in that response are considered in detail in this report.

My investigators have reviewed all the information and documentation concerning the actions of the Ministry relative to this complaint. Mr. A and Mr. B, Division Counsel for the Ministry, were personally interviewed. The complainant was also interviewed, as were other members of the Homeowners' Association. In addition, the Executive Director/Registrar of HUDAC, Mr. C, was contacted and interviewed.

A brief summary of the complaint and the Ministry's commitment to the homeowners follows.

The complainant and members of the Homeowners' Association purchased homes built prior to the enactment of the Ontario New Home Warranties Plan Act (the Act) in a subdivision. Most of the homes were first purchased between 1971 and 1973. The complainants contended that the homes had defects, and they unsuccessfully attempted to get the builder to carry out repairs.

The Homeowners' Association sought assistance at the municipal and federal levels of government, and several court cases against the builder were instituted. No assistance was forthcoming from either level of government, and the court cases were generally unproductive.

On May 10, 1978, Mr. Ross McClellan, MPP, presented a petition to the Ontario Legislature on behalf of 325 members of the Homeowners' Association. The petition complained about the defects in the homes of the homeowners and the fact that the homeowners had been unable to obtain compensation for these defects from the builder. Mr. Drea, the then Minister of Consumer and Commercial Relations, agreed to look into the matter. On August 22, 1979, Mr. Drea wrote to Mr. McClellan about this matter and stated:

> ... you will recall that I pledged my endeavours to find a fair and equitable solution for these people.
>
> I am pleased to report that I have reached an agreement with the HUDAC Home Warranty Program where these homes will be brought up to standard just as though they were covered by the Warranty Program, which came into being after they were built and occupied....

On October 10, 1979, in response to a question from a Committee member, Mr. Drea made the following statements before the Standing Committee on Administration of Justice, as reported in Hansard:

> I have worked out an arrangement whereby all those homes will be repaired and I have communicated that....
>
> They will be brought up to standard...
>
> I would like to get those homes repaired by the end of the year if possible. But it will be done at no cost to the homeowner.

Before the same Committee, the following exchange was reported in Hansard on October 12, 1979:

> Hon. Mr. Drea: ... the arrangement I have worked out is that the deficiencies will be remedied, whatever the deficiencies are.... somebody would be brought in at their convenience, free of charge to them, the place would be rectified up to the present standard--I want to emphasize that one word "present" ....
>
> You put it in place exactly as though it had been covered by the HUDAC home warranty program....
>
> Mr. McClellan: Who will be doing the repairs?
>
> Hon. Mr. Drea: I don't think that has been decided yet. The question was left as to whether [the builder] would be doing it or whether HUDAC would be doing it, and if [the builder]

> refused to do it then HUDAC would do it, but it would be done to HUDAC's specifications, on the basis that if the person who has the remedial work done is not satisfied with it, it would be exactly the same as if he or she had had remedial work done under the HUDAC home warranty program and was not satisfied.
>
> We are trying to work out an easy way, one that's very fair to them, where they don't feel "Okay, someone is coming in and I don't have a voice in it if he says the floor is straight". It will be done at no cost to them and at their convenience.

The following points are apparent to me from Mr. Drea's early statements on the issue:

1. There was an agreement between the Ministry and HUDAC.

2. Repairs to the houses were to be made.

3. The repairs would be made according to the HUDAC standards at that time.

4. The repairs would not be done at the homeowners' expense.

5. The repairs would be done at the homeowners' convenience, and they would have some input as to what was going to be done.

Despite these initial promises by Mr. Drea, the homeowners have never had their homes repaired, and this is the substance of their complaint to this Office. Our investigation involved a review of the initial commitment to the homeowners from the Minister and his officials, the attempts to implement the commitment by the Ministry, the nature of the "agreement" or "commitment" between the Ministry and HUDAC, the written offer of September 8, 1980 from the builder to HUDAC and the Ministry to repair the homes, which offer was never communicated to the homeowners, and the homeowners' conduct throughout the matter.

In the Temporary Ombudsman's letter to Mr. Crosbie of September 21, 1983, he stated the following possible conclusions: that the Ministry had apparently misunderstood the commitment from HUDAC and had unreasonably failed to document the commitment; that the Ministry unreasonably failed to inform the homeowners of the one offer to repair the homes from the builder which was successfully negotiated by HUDAC; and that the Ministry unreasonably failed to apprise the homeowners of what the HUDAC inspectors found and advise them of the Ministry's final disposition of the matter. The Temporary Ombudsman indicated that a recommendation he might make was that the Ministry compensate at least those homeowners who would have benefited had they accepted the builder's offer of repair as negotiated by HUDAC. This offer encompassed those

homeowners who were the original purchasers of their houses and whose houses were suffering serious structural defects to their roofs or foundations. The Temporary Ombudsman also indicated that he might recommend that the Ministry send reporting letters to the homeowners who had submitted deficiency lists with respect to the defects in their homes at the outset of the Ministry's involvement in the matter.

As indicated, Mr. Crosbie responded by letter dated December 16, 1983 to these possible conclusions and recommendations. I have considered the representations made in Mr. Crosbie's letter and reviewed the evidence with respect thereto. I have set out this evidence and the remainder of the evidence relating to the Homeowners' Association's complaint below. I have attempted to do so by taking excerpts from Mr. Crosbie's letter and then discussing the evidence on the points raised in the excerpts.

A. **"... notwithstanding our best efforts, and aided in part by activities of the Homeowners' Association, we were not able to bring the situation to a satisfactory conclusion .... Notwithstanding our efforts, some of which you reproduce, to reassure them [Homeowners] of the fact that to our knowledge negotiations were going well, the Homeowners' Association took what a representative described in a conversation to be "a calculated risk" and went to the press with its story.... The result was that the Homeowners' Association was pressing the Ministry for a total package covering alleged deficiencies in all homes whether still owned by original purchasers or not, while at the same time the builder, apparently seeing no goodwill as a result of the negative publicity, curtailed its offer. The offer when produced covered only original purchasers.... Had the Association not precipitated the matter by the untimely press conference, we might have produced laudable results...."** (Statements made in Mr. Crosbie's letter of December 16, 1983)

I understand Mr. Crosbie to be saying that:

1. The Ministry used its best efforts to do everything it possibly could;

2. The builder, at one point, was willing to do much more for the homeowners than was indicated in the one offer it finally did produce;

3. It was the homeowners' own fault that their homes were not ultimately repaired because of the negative publicity they generated against the builder, which resulted in a curtailment of the builder's offer.

From a review of the evidence, it is clear that the Ministry and HUDAC officials did indeed expend a great deal of time and effort in attempting to reach a satisfactory resolution of this matter. Nevertheless, when one reviews the evidence, it becomes clear that the following comments are also appropriate:

1. The Ministry apparently misunderstood the "commitment" it had with HUDAC, which caused many more misunderstandings to develop.

2. Statements made by Ministry officials, in attempting to implement Mr. Drea's promises, were not always consistent with his promises, which caused anxiety and mistrust among the homeowners.

3. The Ministry failed to fully communicate to the homeowners the "process" that was involved, perhaps because it never fully understood the process itself. This resulted in misunderstandings as to the builder's role and the inspection process and ultimately caused the failure of the Ministry to communicate to the homeowners the only offer received from the builder.

4. There is little evidence to support a conclusion that the builder was prepared to do any more than what it ultimately offered to do.

5. There is little evidence to support a claim that publicity affected the builder's offer, and even if such a claim could be supported, the homeowners cannot necessarily be blamed for the publicity they generated as this was, in part, a result of the frustrations and misunderstandings that evolved in this matter. The publicity was largely directed at the Ministry and not the builder.

6. The Ministry appears to have let the matter go unresolved without officially advising the homeowners of the ultimate disposition of the matter.

The following is a review of the evidence which I feel supports the above-noted comments.

The Ministry's proposed assistance program for the homeowners was reported in the local newspapers in the fall of 1979. From a review of these reports, it is clear that at this stage the Ministry had made its promises to the homeowners without first contacting the builder although, when interviewed by the press, the builder appeared willing to do those repairs which were felt to be necessary. There is no suggestion in the newspaper reports, however, that the Ministry's promises were conditional on what the builder was willing to do. It had made its promises independently of the builder's involvement. At this point, none of the parties involved had a clear idea of the extent of the defects and the nature of the repairs required.

On December 13, 1979, representatives of the Homeowners' Association met with Mr. Drea and other officials of the Ministry. The following are extracts from a newsletter prepared by the Homeowners' Association following this meeting; this newsletter was forwarded to the Ministry under cover of the complainant's letter of December 17, 1979:

> The following are the highlights of the program:
>
> 1. All [the builder's] Homes will be eligible for repairs, irrespectively [sic] whether at present occupied by original (first) or subsequent owner....
>
> 3. All houses will be brought to the present Home Warranty Standards, if it is found that corrective actions are required.
>
> 4. The extent of the repairs will be established as follows:
>
> - each owner will be responsible for preparation of a list [sic] of deficiencies using the attached form (please prepare 3 copies--Ministry, HUDAC, Owner)
>
> - each house will be inspected by the HUDAC Building Inspectors during the time indicated on the form
>
> - the owner will be notified by HUDAC about the type and extent of the necessary repairs
>
> - in case of disagreement between the owner and HUDAC, disputed items will be reviewed by the Ministry of Consumer and Commercial Relations and their decision will be final....
>
> We would like to remind you once again that the credit for the above arrangement is due to Mr. Ross McClellan, who raised the matter in the legislature and to Mr. Frank Drea, the Minister of Consumer and Commercial Relations.

At the time of the complainant's letter of December 17, 1979 to the Ministry enclosing the newsletter, the inspections had already commenced and the complainant in his letter complained about the manner in which they were being conducted, as follows:

> The HUDAC inspector did not disclose to any homeowner what the results of his inspections were. In one instances [sic], the inspector would not even disclose, though requested by the homeowner, the Warranty Standard for the fill below the slab-on-grade. Such secretiveness do [sic] not, naturally, inspire

confidence in the inspections undertaken. We request that the HUDAC inspector at the end of individual inspection, inform the homeowner what his inspection findings are.

Mr. Crosbie's letter of December 16, 1983 suggested that the correspondence which we reviewed during our investigation "fails to reflect... the tone taken by the Homeowners' Association". The above-noted correspondence may be an example of this "tone". I would agree that at such an early stage of the Ministry's program to assist the homeowners the complainant, in his letter of December 17, 1979, took a somewhat antagonistic and demanding tone. Certainly, at this stage, the homeowners could be faulted for this approach. However, the homeowners knew that there would be some debate about the type of repairs to be done and wished to have some input into this process as they were promised they could by Mr. Drea. As it turned out, the homeowners were never really given the chance to get sufficiently involved in the inspection process, and this failure led to the communication problems as to the types of repairs that were to be performed and was a major source of anxiety and distress among the homeowners.

In response to the complainant's letter of December 17, 1979, Mr. A wrote to the complainant on December 27, 1979 and stated the following:

> My recollection concerning the meeting was that when the comprehensive listing of suspected or known <u>substantial deficiencies</u> is available the Warranty Program will pick it up promptly....
>
> I imagine that the inspectors will continue to go about their initial inspection activity without much dialogue. It is not a question of secretiveness at all. It is simply a question of gathering all available information into one total package and assessing it all on a standardized basis using whatever other expertise is needed to reach one uniform conclusion about the problems.... [Emphasis added]

I think this letter is indicative of two things:

1. that Mr. A introduced the possibility that it was only substantial deficiencies that would be covered (this had not been indicated in Mr. Drea's comments); and

2. that there was no conscious effort to be secretive on the part of the Ministry as to the inspection process, but that the manner suggested was the way it thought the job would be best performed. Mr. Drea, however, had promised that the homeowners would have input into the inspection process.

One hundred and forty-four homeowners submitted deficiency lists to the Ministry in January, February and May of 1980 outlining the defects in their homes. The Ministry had told the homeowners that those who had submitted lists in January and February (approximately 111 homeowners) would be advised by May 15, 1980 of those repairs that would be effected, and that the repairs would begin on June 1, 1980. Unfortunately, HUDAC officials had underestimated the time involved to perform the inspections, and the deadlines were missed. The homeowners were beginning to get very anxious as by then more than six months had passed since the original promises, and the homeowners did not know what the inspectors had found and what repairs would be performed.

Throughout this period there were telephone conversations and written correspondence between the Ministry and the homeowners which essentially reflected the homeowners' desire to know more about what was going on. The Ministry's advice to the homeowners was "to be patient--that things were going a little more slowly than planned--but that things were going to work out". What the homeowners wanted was some input into the inspection process before the repair program was announced. They wanted to assure themselves that their own views of which defects were below HUDAC standards and needed repair corresponded to the results of the inspection process. The homeowners' requests for more involvement were, on some occasions, demanding and abrupt, but the Ministry would not give them any commitment that it would allow their input into the repair program. The homeowners also complained that those homeowners suffering emergency problems such as leaking roofs were not properly being looked after.

The complainant finally wrote to Mr. Drea personally on July 3, 1980 requesting a meeting with the Minister. The complainant made the following statements in his letter:

> The homeowners have not even received a notification of the findings of the HUDAC inspectors though the inspection was completed some time ago. Even our simple question to the Ministry whether such a notification will or will not be received so far remains unanswered.

In fact, the inspections were not yet complete at this point.

In the meantime, the matter had again been discussed before the Standing Committee on Administration of Justice on June 12, 1980. Mr. McClellan, Mr. A and Mr. Drea were there, and Mr. A explained that the delay in finalizing the inspection process was partly because HUDAC had underestimated the time it would take to do the inspections and partly because the Ministry was concerned about water damage to roofs and basements and had hired a roofing expert to do a special analysis of the problem. The following are some comments that were made before the Committee as reported in Hansard:

Mr. Simpson: the association did an excellent job. It prepared a form and circulated it out to all the home owners, asking them to fill it in and list the kinds of faults they thought existed in their homes....

We, too, would have liked to have seen the inspection program finished up before now, and we are in the final stages now....

I am hoping we will have some news for these home owners very shortly....

Mr. McClellan: At this point you are not able to give some firm timetable targets for the repair work to actually begin.

Mr. Simpson: As you probably know, we endeavoured to get something going. We anticipated something would be going by way of rectification, and that those things would be dealt with around June 1. We do not feel that HUDAC, having made about a 12-week target, are far off the mark -- just a couple of weeks. I think it is fair to say the builder is ready to sit down and hear the news. He is waiting for the word on this from the association [HUDAC]. The association is still, as I said, in the final stages of assessing all the findings and trying to make some determination. [Emphasis added]

I have not heard from them this week, but I believe the final analysis of the water situation will be concluded this week.

Hon. Mr. Drea: If I could interrupt: Without setting a firm date, we really want the work to commence forthwith, because I do not want it to go on over the winter....

Mr. McClellan: I think the individual home owner should be notified as quickly as possible with respect to the inspection report findings and the determination of what is going to be done. Can you tell me how soon that might be possible to do?

Hon. Mr. Drea: Just as soon as they are completed. I think, in many of the cases, we could probably give it to individuals now. But the group, since they chose to act as an association, wanted it all at the same time....

Mr. Simpson: Everyone will receive a full communication. 'Here it is, Mr. and Mrs. Smith. This is the situation on your house and this is what is proposed.' There will be one communication to each of the owners individually. This was the deal a long time ago....

> Mr. McClellan: So the standards with respect to the quality of the workmanship and the repairs will be the standards under the Housing and Urban Development Association of Canada warranty program....
>
> Hon. Mr. Drea: Yes.... We pointed out that if they were not satisfied with the workmanship they would file a complaint with HUDAC, then HUDAC would go out and ascertain whether the complaint was valid. If the complaint was valid, then the workmanship would be upgraded or made satisfactory....
>
> The bottom line is that the remedial work will be completed satisfactorily according to the original inspection report of the deficiency.

It should be noted that Mr. Drea's comment that it was the association's desire to get the inspection reports "all at the same time", is incorrect as this was the Ministry's decision.

In response to the complainant's persistent inquiries as to the progress of the matter, the Acting Executive Director, Business Practices Division, wrote to him on July 8, 1980 and stated as follows:

> ... As indicated to you by Mr. B, it appears that progress is still being made. With respect to your request for a letter to each homeowner, it is my hope that at the end of the negotiation it will be possible to provide each homeowner with a letter outlining at the very least those items which will be attended to. I trust you will find this to your satisfaction.
>
> We will contact you as soon as we have a solid basis for meeting. [Emphasis added]

The homeowners appeared alarmed by this reference to "negotiation". In another letter to Mr. Drea on July 14, 1980, the complainant pointed out some of the recent comments made by Mr. Drea and Mr. A on June 12, 1980 before the Standing Committee on Administration of Justice, and particularly noted that it was stated that the builder was waiting for "the word" from HUDAC on the work required to bring the homes in question up to the HUDAC standards, and that the work would be done before the winter. The complainant added:

> Paragraph 2 of a letter from [the Acting Executive Director] dated July 8, 1980 (copy enclosed) puts the whole process into confusion and doubt. What is being negotiated? Is it a dispute over what is deficient and whether or not certain items are covered by the HUDAC warranty? What is the time frame of this negotiation? We request for clarifications....

> To date, they [homeowners] haven't heard a thing. They feel disillusioned. They feel desperate. To discuss all these substantive questions, on July 3 we wrote requesting for an opportunity to meet with you. Would you give us this opportunity?

This correspondence suggests that there was a negotiation process ongoing, but that the homeowners did not clearly understand what was being negotiated. They had been led to believe from Mr. Drea's statements and certain press reports that there was a commitment from HUDAC to have the homes repaired regardless of the builder's involvement. The press reports had also made it clear, however, that the builder had expressed a willingness to do whatever HUDAC required it to do. There is also some evidence in the Ministry's file on this matter that indicates that the word "negotiations" was mentioned at different times to the homeowners, but it would not appear that it was ever put to the homeowners that their recovery was entirely dependent on the builder's goodwill, and that it was with his goodwill that the process was continuing. This appears to be a position that evolved when the Ministry realized it did not have the commitment from HUDAC that it thought it had. The Ministry did not take the opportunity raised in the complainant's correspondence to inform the homeowners at this time that this was its position.

The press and Mrs. Margaret Campbell, MPP, had become involved in the increasingly anxious situation between the homeowners and the Ministry. On July 26, 1980, the first of three articles (later referred to as a "spate of publicity" by Ministry officials) appeared in a local newspaper entitled "Owners assured home repairs will be made". The article indicated that the homeowners were afraid that Mr. Drea might be backing away from his commitment, but Mr. B of the Ministry assured the reporter that the repairs would be started as soon as the report from HUDAC was received. Mr. B is quoted as saying:

> It may be next week or next month. I can't say but it will be done this year. There is no reason to believe that seasons will be advancing on them [homeowners] and that the weather will be a problem.

Mrs. Campbell is quoted in the article as saying that she sympathized with the homeowners who "feel they are sitting outside the negotiations without any information". Mr. McClellan is quoted as saying that there might be a communication problem between the owners and the Ministry, but that he felt that there was no reason to believe there was any bad faith on the part of the Ministry. The builder's name is not mentioned in this article.

On July 18, 1980, Mrs. Campbell had written to Mr. Drea indicating that she had been trying, on a daily basis, to reach him to discuss the homeowners' desire to meet with him. She stated in her letter that the homeowners had at no time requested that all the reports be sent out at once, and that the homeowners had asked that the inspection reports be given to each of those who had filed complaints. Mrs. Campbell stated that she felt this should have been a minimum requirement. She further stated:

> They understand that there are negotiations; Mr. B advised me of that. On the other hand, Mr. A says that the builder is ready to sit down and hear the news. What is happening is that they have no assurance at all of what the inspectors have reported, and therefore, what you are requiring the builders to do.
>
> It does seem to me that in view of the commitment to these people, the minimum requirement is that they know what the inspectors found. There is no point in them getting a letter at the end of the negotiations saying what you have settled for. I don't seem to be able to make anyone in your Ministry understand that position.

Mr. Drea responded to Mrs. Campbell by letter dated August 1, 1983 and indicated that:

> The Association and all the media with whom they have been in contact have been advised that the process is going ahead and that we anticipate that an announcement can be made in the near future.... The reports being prepared by the New Home Warranty Program have not yet been received by us and I can assure you that we have no interest in this matter other than to see that such major deficiencies as may exist are rectified in good and workmanlike manner. [Emphasis added]

This would appear to be the first time, in writing, that Mr. Drea suggested that the repair program covered major deficiencies only.

On August 4, 1980 an article entitled "Repair plan not enough for long-suffering homeowners" appeared in another local newspaper. The article indicated that although the homeowners "have the word of the Ontario government that defects built into their homes will be repaired before winter comes", the types of repairs to be performed as indicated by Mr. A and Mr. C of HUDAC to the reporter are, according to the complainant, "a giveaway to the builder and a betrayal of promises made to the association". The article said that the complainant learned only that month from the reporter that "the only deficiencies to be repaired will be those that have already caused identifiable problems". The article further stated:

> Mr. A and Mr. C, general manager of the warranty program, confirmed in separate interviews that complaints about cosmetic defects will not be dealt with, nor will repairs be made to structural defects that have not resulted in problems--even if the failures are due to shoddy workmanship or to violations of the Ontario Building Code.

This was the first indication the homeowners had that the repairs would be limited in this manner. The article also pointed out that the homeowners were dissatisfied with the fact that they would only learn what repairs had been agreed to and not what defects were judged to be outside the warranty scheme. Mr. A was quoted as saying that the entire process was being conducted in good faith, and that the June 1, 1980 deadline was an "honest error" by Mr. C. "The inspections were to only take 12 weeks and instead, they've been 16 or 20. What's the big deal? It's a non-issue, not a cause for great alarm.... But their worries are the result of eight years of frustration rather than the realities of the last few months." The article did mention the name of the builder and some of the other projects the builder was involved in.

On August 15, 1980, the last of the three articles written during the summer of 1980 appeared in a local newspaper entitled "Defects report to homeowners within a week". This article, which was printed a little more than three weeks before the builder's offer of September 8, 1980, gave a positive account of the ongoing negotiations with the builder. Mr. C was quoted as saying that the engineering reports on the defects had been completed and that the homeowners would know within a week what repairs would be done. He is quoted as saying: "I don't think the builder has any objections to repairing legitimate items that are defective." The article then stated "But he [Mr. C] said many of the complaints have nothing to do with the original construction of the houses and have come from people who aren't the original owners. 'If you bought a car from General Motors and, eight years later, the engine conked out, maybe GM would do something for you but probably not,' [Mr. C] said." Mr. Drea was then quoted as saying "I said the houses would be fixed up and they will be fixed up, I'm the first guy who's ever done anything on it." Mr. A was quoted as saying that he was worried about the effect of the continued publicity on the houses' resale value.

This article is instructive for three reasons:

1. The comments of Mr. C, the only person negotiating with the builder, suggest that he was sympathetic with the builder's view that non-original owners of the homes should not be compensated;

2. Mr. Drea had reaffirmed his commitment;

3. Mr. A's stated concern about the effect of the publicity was on the resale value of the houses and not on the effect the publicity might have on the builder's assistance in effecting the repairs.

As part of the publicity during the summer of 1980, Mr. B had appeared on a radio show to answer questions on the homeowners' situation.

On August 18, 1980, Ministry officials met with some of the members of the Homeowners' Association, and in attendance were representatives from local newspapers. From the Ministry's and Homeowners' Association's notes on what transpired at the meeting, it seems that the focus of the meeting was the homeowners' concerns about the types of deficiencies which would be covered by the repair program-- the Ministry officials stating that it was only those causing identifiable problems, and the homeowners arguing that Mr. Drea had promised more than this. The Ministry promised that each homeowner would be given a letter which would contain a reference to both those matters complained of which would be corrected and those matters adjudged to be either cosmetic or caused by lack of maintenance. The homeowners were told they could expect this notification "within a couple of weeks" and that the repairs would be completed before the winter of 1980.

This meeting was thus a fairly positive acknowledgement that the repair program was about to be initiated, although the important issue of the types of repairs was becoming increasingly strained. The Ministry did not appear to have taken this opportunity to explain to the homeowners that any repairs were entirely dependent on the builder's agreeing to effect these repairs and that, should the builder not agree, no repair program would be forthcoming. The Ministry had no reason to tell the homeowners this because it felt things were progressing nicely with the builder, and the Ministry had not really crystallized its position at this point.

Meanwhile, Mrs. Campbell, MPP, continued to write letters to Mr. Drea and the Ministry officials on behalf of the homeowners, pointing out the apparent inconsistencies in the positions of the Minister and his officials and urging the Ministry to supply the homeowners with the results of the inspections. For example, on August 25, 1980, she wrote as follows:

> What is the mystery about the HUDAC Inspection Reports? Have they been done? If they've been done, why haven't they been sent to the homeowners? Why are the positions of you and Mr. A at variance, and why does Mr. A's opinion and statement prevail? I would like straight answers to those straight questions!

On September 5, 1980, Mrs. Campbell wrote again to Mr. Drea, pointing out that Mr. Drea had promised in the Legislature that "the deficiencies will be remedied whatever the deficiencies are," and that Mr. A was quoted in a newspaper article on August 4, 1980 as saying that complaints about cosmetic defects would not be dealt with nor would repairs be made to structural defects that had not resulted in problems. She stated:

> As you will readily see, the two statements are not compatible. You made no exceptions. Mr. A is waffling around with exceptions. The people have tried desperately to reach you and you have denied them a meeting with you to clarify the situation. The Inspectors Reports have not yet been made available although we understood that they were to be available to the owners. What is the problem?

On September 12, 1980, Mr. Drea wrote to Mrs. Campbell indicating that, to his knowledge, Mr. A had been handling the matter in a manner consistent with his views. Mr. Drea further stated:

> At the appropriate time each homeowner will receive a letter which will indicate both the matters of which they have complained as well as the corrective work intended.

In the meantime, HUDAC had forwarded the completed inspection reports to the solicitor for the builder. On September 8, 1980, the solicitor for the builder forwarded to HUDAC the builder's offer to repair the homes. It was noted by the builder's solicitor that "the majority of the complaints relate to minor items," but that the builder was concerned with the reports regarding roof leaks and foundation leaks. The builder agreed to provide assistance to <u>original homeowners</u> who were then experiencing problems with the roofs and foundations, but not to resale buyers. This position was not surprising based on Mr. C's earlier comments to the press. The builder, however, was only prepared to pay 80% of the cost of the repairs, which was something unexpected.

The Ministry was not pleased with this offer, as was indicated in Mr. A's letter of October 7, 1980 to Mr. C, wherein he stated as follows:

> It appears at this stage that there is a shortfall in coverage under this particular proposal over the coverage that was understood back when this program was undertaken by yourself and Mr. D [Chairman of HUDAC] in discussions with Mr. Drea and myself. The shortfall it seems clear, relates to an owner cost sharing now being proposed and the limitation of the program to first owners.

> The Minister has advised the House on a couple of occasions on the basis of his understanding of your undertaking and must of course report back to the House with respect to those undertakings....

Mr. C then wrote back to Mr. A on October 29, 1980. His letter clearly highlights the misunderstanding between the Ministry and HUDAC. Mr. C stated:

> There is, I am sure, some misunderstanding as to undertakings given by Mr. D and myself. There can be no doubt that Mr. Drea asked that the Program use its best efforts to sort out some problems being encountered by [the builder] or [the] homeowners. I agreed to do what we could believing that the complaints were of recent vintage and had probably been given directly to Mr. Drea.
>
> As you know, it was only a short time later when it became obvious that the complaints Mr. Drea spoke of were 7-8 years old and numbered in excess of 140. It became clear to us at this stage that Mr. Drea was talking about one thing and we another. Despite this, we continued to do everything possible to facilitate the efforts of Mr. Drea to assist those homeowners with legitimate problems....
>
> You indicate in your letter that the proposal by the builder appears to represent a shortfall in coverage over the coverage that was understood at the time of the original discussions. I am sure that this correctly reflects your understanding. However, the Program's understanding and commitment was that we would do everything we could to assist, and we have done that. The undertaking given by the builder may not be as extensive as some would like; but it, nevertheless, represents a substantial warranty and one that is not often provided by the producer of any product after a period of 7-8 years.

Not only does the letter highlight the misunderstandings, but it is clear that Mr. C, the only person who negotiated with the builder, was sympathetic with the builder's offer and considered it a good one.

The view of Mr. C is also evident from his comments to the Ministry when he forwarded copies of the inspection reports to it on October 29, 1980, as follows:

> The inspections indicate that for the most part these homes were built in accordance with the building standards at the time of construction. Most of the problems mentioned by

> homeowners while no doubt annoying, cannot be considered serious. The only problems which can be considered potentially serious are those relating to roofs and one or two foundations.

The "commitment" from HUDAC to which Mr. Drea referred on many occasions was obtained in a meeting attended by Mr. D, Mr. C, Mr. A and Mr. Drea. The meeting was held on February 20, 1979. The minutes of the meeting were not recorded in the Ministry's file, nor was any correspondence launched between HUDAC and the Ministry which might have confirmed the specifics of the commitment. My investigator was advised by Mr. A that the February 20, 1979 meeting had been scheduled to discuss HUDAC's budget requirements for the coming year. The discussion about the plight of the Homeowners' Association took place towards the conclusion of the meeting and was conducted very informally. Mr. A stated that Mr. Drea had mentioned his intention to assist members of the Homeowners' Association, and he asked Mr. D and Mr. C if he could count on their help. Apparently, the HUDAC officials gave their assurance that they would assist the Minister in any way that they could. There was no further correspondence or documentation with respect to this "commitment" until the letters above-noted.

Following receipt of the builder's offer, the Ministry officials met with the Homeowners' Association on September 15, 1980, but did not reveal the offer they had received from the builder, as they felt the offer was not sufficient. In the Temporary Ombudsman's letter of September 21, 1983, he stated as one of his possible conclusions that he felt that the offer should have been communicated to the homeowners. The justification given by the Ministry for not communicating the offer is set out in Mr. Crosbie's response of December 16, 1983, as follows:

> It was an offer which we had been led to believe in no uncertain terms was not acceptable to the Homeowners' Association. Because of this the offer was not presented and as again indicated by correspondence which you have reproduced an attempt was made to obtain a fuller package. Ultimately the effort to obtain a fuller package was not successful.

There would appear to be no doubt that the homeowners would never have accepted the builder's proposal had it been presented to them at the time it was made, in the circumstances as they then were. This is clear from the newspaper articles, the correspondence, and conversations that members of our staff have had with the complainant. The reason the homeowners would not have accepted the proposal at that time was that they had been promised more by Mr. Drea and, to a lesser extent, by other Ministry officials. The homeowners did not place the primary responsibility for the repairs on the builder because the Ministry had indicated that the commitment was from HUDAC, and their understanding was that if the builder wasn't willing to go along then HUDAC or the Ministry would

step in. It may have been reasonable for the Ministry to keep silent about the offer at the September 15, 1980 meeting, as the Ministry genuinely hoped that the builder's offer could be improved. However, as we shall see, the reasonableness of the omission to communicate the offer can be questioned as the chances of an improved offer became increasingly slim and a deadline for acceptance of the original offer from the builder was established.

On November 4, 1980, Mr. Drea wrote to the Chairman of HUDAC, asking him to "personally examine the ramifications of the current situation" and to "intercede to get matters moving ahead quickly". The Chairman responded by letter dated November 13, 1980 stating as follows:

> I have examined the Program's role in this endeavour, which we were pleased to undertake on your behalf. I must emphasize, however, that prior to becoming involved in a detailed examination of complaints, we were not aware of the magnitude of the complaint problem or of the several years interval between the construction of the homes and the discussions held with you. It was our understanding at the meeting that these were relatively minor complaints, and we stated only that we would be pleased to look into this matter for you.
>
> Despite the facts that subsequently became apparent to us, our people worked hundreds of hours, expended substantial sums of money and achieved, through the builder, a settlement which appears to be eminently reasonable. I suspect that to further pursue the builder with respect to second or third purchasers of units several years old would likely produce nothing and leave more than a suggestion of unfairness.

This letter, once again, highlights the communication problems that existed between HUDAC and the Ministry as to the nature of the commitment and indicates the view of HUDAC that the builder had been more than reasonable in its offer.

Meanwhile, the homeowners' situation was again discussed at the Standing Committee on Administration of Justice on November 5, 1980. The principals in the discussion were Mrs. Campbell, Mr. A and Mr. Drea. This was a very extensive discussion tracing the history of the homeowners' problems, the commitment obtained from HUDAC, the types of repairs that were expected to be done, the problems with the inspection reports and the timetable for repairs. Mrs. Campbell started off the discussion by pointing out the apparent inconsistencies in the promises of Mr. Drea and Mr. A as to the types of repairs. Mr. A maintained that there were really no inconsistencies, and that the repairs that would be done would be those real problems that could be attributable to the original construction work of the builder. Mr. Drea made it clear that

the intention was, right from the beginning, that both original and subsequent homeowners would be covered by the repair program. Mr. A emphasized that his concern throughout had been to give the owners "a full and complete and straightforward report" that includes every item complained about by the homeowners, and a "straight, strict answer to each and everything, yes or no: 'It is your own problem'. 'It is a builder problem' or 'It is a maintenance problem.'" Mr. Drea then spoke about the commitment obtained from HUDAC, as follows:

> The commitment that was reached was that the deficiencies would be repaired, because I wasn't going to get into legalisms with the industry represented by the Housing and Urban Development Association of Canada. I have never discussed this matter with [the builder]...
>
> Since they have no legal power under terms of a registration or what have you to enforce this, the commitment was that if after the negotiations, which involved all of these inspections and finding out about the material, [the builder] maintained their original position that they had no legal responsibility under the home warranties program to do anything, the home warranties program would step in.... [Emphasis added]
>
> We want that impasse broken or we are going to say the minister has a commitment from the HUDAC home warranties program that if this can't be resolved, it [HUDAC] will resolve it. How it deals with [the builder], I don't know ...
>
> Who pays for it? Let them settle that afterwards. It won't be the homeowners.

Mrs. Campbell then raised the point about the missed deadlines for repairs to begin and Mr. Drea stated as follows:

> Mrs. Campbell, let us speak about the deadline for a moment. We didn't want this thing to carry on to 1990 so that when somebody is going into a senior citizens' apartment there will be a little write-up that this is the last of the original ... home owners and nothing has been done.

As a final question Mrs. Campbell asked Mr. Drea when the matter would be terminated, noting that he had said in an earlier statement that it would be "very soon". Mr. Drea agreed that it would be very soon and referred to an upcoming meeting with the parties involved, saying that he would "hope to be in a position before the Legislature ends to give some relatively firm dates as to when the remedial work will be done". The Legislature was ending on December 12, 1980, and Mr. Drea made the following final commitment:

> ... certainly at least by December 12 there will be a full game plan so that everybody knows what is happening within the time frame.

The Legislature was dissolved on December 12, 1980 for the upcoming election in March of 1981. No "game plan" was revealed as to the program of repairs. Apparently, there was a meeting between HUDAC and Ministry officials on December 18, 1980 at which the HUDAC officials agreed to correspond with the builder to attempt to improve the builder's offer. On March 5, 1981, Mr. C wrote to the solicitors for the builder, pointing out that it was the Ministry's view that the builder's proposal did not go far enough, and asked if the builder would review his position with a view to improving his offer. Throughout this time the Homeowners' Association was unaware an offer existed.

On March 10, 1981, the solicitor for the builder responded in writing to Mr. C and made the following comments:

> ... Coincidentally just after receipt of your letter I had a telephone call from [a local newspaper] advising that there was going to be a march in front of the Honourable Frank Drea's home....
>
> I was particularly impressed with the ... reporter who seemed to think that after these years the offer [the builder] already made was more than fair. I believe that reaction to be a reasonable one.
>
> I should respectfully suggest that the matter be reviewed in light of all the circumstances. It seems quite coincidental that the agitation by the nine home owners should arise just at election time. May I say that we have not had any refusal communicated to us indicating that the home owners have refused our offer. It appears almost as if they wish to keep a number of strings in their bow at the same time. If the home owners do not accept our offer by the 25th March, 1981, I would have to advise my clients at that time the offer should be withdrawn.

As one can see, the solicitor for the builder was under the impression that the homeowners had received the original offer from the builder. In fact, the agitation referred to in the letter was being done in ignorance of the builder's offer. The agitation referred to was the picketing by some homeowners of Mr. Drea's and Mr. Davis' houses in March of 1981, because of the alleged inaction of the government. The focus of the picketing was not on the builder's inaction, but the government's inaction. There had been no publicity about the situation since the summer of 1980 when the three newspaper articles appeared, until an article appeared in another local newspaper on February 16, 1981

entitled, "Still waiting for Drea to act, homeowners say". This article focused entirely on the Ministry's inaction with respect to the homeowners' problems. The article noted that Mr. Drea had told a committee of the Legislature on November 5, 1980 that details of the repairs would be announced by December 12, 1980, which was not done. Another article appeared in a local newspaper on March 7, 1981 entitled, "Residents picket Drea home". Again, the article focused on Mr. Drea's unfulfilled promises. A third article appeared in the newspaper on March 9, 1981, and was entitled, "Studs pop, basements leak in $250,000 homes". This article dealt with the problems in another subdivision built by the same builder and reference was made to the homeowners on several occasions.

The homeowners had also contacted our Office by this time, and in March of 1981 we informed the Ministry of our intention to investigate the homeowners' complaints.

There was a public meeting held on March 16, 1981 at which Ministry officials and the homeowners were present. Even at this late date the Ministry, although not very encouraging, did not dismiss the possibility that the matter would be satisfactorily resolved.

There was little progress made from this point forward. The deadline of March 25, 1981 for acceptance of the builder's offer was allowed to expire without notification to the homeowners, and the promised repair program was allowed to go unresolved. The homeowners have never been formally advised of the Ministry's final disposition of this matter, nor have they received the promised report on the outcome of the inspections of their houses.

Quite a number of months later, the entire matter was discussed before the Standing Committee on the Administration of Justice. The date was November 12, 1981. At this time there was a new Minister of Consumer and Commercial Relations, the Hon. Mr. Gordon Walker, who was in attendance along with Mr. A and other Committee members. Mr. Williams, MPP, defended the actions of the government and claimed that there was an "agreement between the developers and the home owners", but "... the home owners in this case had been their own worst enemies in taking the precipitous action they did in engaging in public demonstrations that had completely destroyed the benefits that had resulted from the negotiations, and from which the developer withdrew because of those circumstances.... These arrangements were torpedoed because of the most unfortunate action taken by the homeowners or their representatives at the time."

Following these remarks by Mr. Williams, Mr. Elston, MPP, defended the homeowners, stating that "they have a right to get a little bit itchy", and that he could not "blame them for participating in the public forum...."

Mr. A then gave his version as to why the matter could not be satisfactorily resolved:

> Our problem really started last summer when we said, 'Things were going along. Be patient.' Things were not going that fast; I do not disagree with that. The inspections took longer than we would have liked. The resolution of the engineering things took longer than they probably should have. But it was going along not too badly. The builder was still in. Then we went through a real spate of media exposure in July, August and September of last year.... It was after that spate of publicity that he consulted his corporate counsel, who, I am sure, said: 'Mr. Builder, I have to advise you here you have no legal obligation. These homes are almost 10 years old. You have no legal obligation.' Things started to deteriorate from that point on.

Mr. Swart, another MPP, then asked the following question of the new Minister, Mr. Walker:

> Surely what we are really discussing is a commitment by the former Minister of Consumer and Commercial Relations--an unequivocal, flat commitment--and this minister should give some indication of whether he is prepared to live up to that commitment, which was given unequivocally and many times.

Mr. Walker's response was as follows:

> Come on. He thought he had a deal and I gather from what has been said the people went and blew it.

An article then appeared in another local newspaper on Thursday, November 26, 1981 entitled "Homeowners blamed for failure of firm to repair problem houses". The article pointed out that two Ontario Cabinet Ministers, Mr. Drea and Mr. Walker, claimed that the homeowners were the authors of their own misfortune. Mr. Drea is quoted as saying: "We moved heaven and earth to bring the builder back to his deal", but the homeowners "rocked the boat" with their protests and picketing. Mr. McClellan, MPP, is quoted in the article as saying that there was an unequivocal promise made by the government, and "if they're saying a demonstration in February, 1981, had something to do with it, that's laughable. By that time, the promises had all been washed down the sewer".

An investigator at our Office, contacted Mr. C of HUDAC following receipt by our Office of the Ministry's representations. Mr. C was questioned as to whether he felt that at any time a better offer could have been obtained from the builder, and what he felt was the effect of

the publicity. Mr. C indicated that there was "no way" that the builder was willing to satisfy all the deficiencies of the original and subsequent homeowners. He felt that the one offer was the best offer that could have been obtained and, in fact, was a good offer. He indicated that the builder knew right from the beginning that there was no legal obligation to do anything, and this was the basis on which Mr. C negotiated. His recollection of the effect of the publicity was that the March 25, 1981 deadline was put on the offer. He did not feel that the publicity prior to the offer from the builder had much effect. Mr. C did seem to have some difficulty, however, remembering the sequence of events.

When our investigator outlined the Ministry's view of the effect of the publicity and the fact that the builder "curtailed its offer", Mr. C did acknowledge that at the beginning the builder was very cooperative and agreed to do anything that HUDAC wanted, and that at some point the builder got "cheesed off", as did the builder's lawyers. Mr. C did not necessarily agree that the builder involved his lawyer as a result of the publicity, but felt that the builder relied heavily on his lawyers for advice as matters became more complicated. Mr. C reaffirmed his feeling that the offer that was received from the builder was a good offer, and when asked whether HUDAC would have required the builder to do any more he replied, "probably not". Mr. C's feelings about the builder's offer are clear from the earlier correspondence and newspaper reports cited above.

In summary, I would conclude that the evidence suggests that the Ministry understood it had a commitment from HUDAC as representatives of the building industry to assist the Ministry in instituting a repair program for the homeowners. The Ministry understood that HUDAC would be contacting the builder, whom the Ministry understood to be cooperative, although the extent of the repairs required was not yet known. The Ministry's understanding was that if HUDAC were not successful with the builder, then HUDAC or the industry would step in and fill the void. The essential promise was that the repairs were going to be done, and they were going to be done at no cost to the homeowners.

Through the course of events, particularly when the Ministry realized that it did not have the commitment from HUDAC that it had thought it had, the Ministry's position evolved into making its promised repair program conditional on what the builder was willing to do. The builder was not prepared to do everything that the Ministry had promised the homeowners would be done and, in the result, nothing was done. The publicity generated by the homeowners may have had some effect on the attitude of the builder, but there is little evidence to support the Ministry's claims that the publicity was the reason the entire matter "fell through". The sequence of events does not support this position. The only offer that was forthcoming from the builder was felt to be fair and reasonable by the party (HUDAC) which was charged with securing the

offer. If the publicity that occurred in the summer of 1980, which did not include any picketing or public demonstrations, somehow affected the offer, the homeowners should not necessarily be blamed for this, as they had no clear appreciation of the process being undertaken, and they had not been included in the inspection process.

It would also be my view that once the Ministry's position had evolved to one of having the repair program entirely dependent upon the builder's willingness to effect repairs, the Ministry should have made this clear to the homeowners and given them the opportunity of accepting or rejecting the builder's offer. The Ministry would no doubt still have been criticized by the homeowners for changing its position, but at least it would not now be subject to the added criticism that it did not inform the homeowners of the builder's offer.

B. **... based on a genuine concern for the situation of the home owners, the Ministry was prepared to intervene on their behalf in a situation where it lacked legislative jurisdiction ... we feel we have participated in a voluntary effort with the best of good will ... the agreement was clearly gratuitous on the part of both the Ministry and the New Home Warranty Program....** (Statements made in Mr. Crosbie's letter of December 16, 1983.)

The Ministry's position seems to be that because the intervention was gratuitous, it should not be held responsible for its failure to achieve a beneficial result, even if it could be criticized for the manner of its intervention. The homeowners maintain that the promises should not be viewed as entirely gratuitous. When the New Home Warranty Program was instituted in 1977, the homeowners made objections to HUDAC and the Ministry about the registration of the builder because of the builder's past misdeeds. HUDAC made the decision to register the builder based on its conduct at the time of application which was acceptable despite its past misdeeds, and the Ministry, when asked to review this decision, affirmed HUDAC's position. The homeowners argue that this would have been a perfect opportunity to force the builder, prior to allowing it to be registered, to deal with the homeowners' complaints. Mr. Drea alludes to this possibility in his statements made to the Legislature on December 13, 1978 as reported in Hansard, as follows:

> Hon. Mr. Drea: I have the feeling that once somebody has paid their debt, the past shouldn't necessarily be held against them forever; except in this case [the builder] has never paid its debt.

> Mr. McClellan: ... It seems to me it would have been legitimate at the time to say to [the builder] and its offspring: 'If you want to be registered under HUDAC, you settle up with these folks. You settle up with these folks you've ripped off, then we'll look at your application to register.' But that wasn't done.
>
> Hon. Mr. Drea: Yes, obviously it wasn't done.

Following this exchange, Mr. Drea agreed to look into the matter. Mr. Drea is also quoted in Hansard on October 10, 1979 as follows:

> Hon. Mr. Drea: As you know, the difficulty in [this] situation is they were built prior to the HUDAC home warranty program. I think it was always implicit that the homes should be repaired, although the argument laterally has not really been that. It has been on the question of why the principals of [the builder's] homes were registered under HUDAC at the time.... It was a judgment call. People were terrified of litigation. Okay. They are there. I have worked out an arrangement whereby all those homes will be repaired and I have communicated that....

Mr. Drea made the following statements before the Standing Committee on Administration of Justice on November 5, 1980, as reported in Hansard, when discussing how the Ministry originally got involved in the situation:

> Hon. Mr. Drea: ... That request to me was, knowing at the time of the introduction of the HUDAC home warranties program that [the builder] was registered and allowed them to continue to build, notwithstanding what had happened in the particular subdivision ..., and realizing there is no legal responsibility for the home warranties program to be compelled to remedy the deficiencies in that subdivision, would I see what I could do? ...
>
> Mrs. Campbell: You will agree there was some responsibility in not accepting for registration a firm with this kind of background.
>
> Hon. Mr. Drea: Mrs. Campbell, that was a matter that had already been decided.... Our commitment was that since there was responsibility, forgetting legalism, we agreed on this point that we would proceed with orderly negotiations.

It would also seem that Mr. Drea, in making his promises to the homeowners, had a very genuine, personal concern for these people, having

actually inspected the homes several years before when he was Parliamentary Assistant to the then Minister of Consumer and Commercial Relations. Mr. Drea stated before the Standing Committee on the Administration of Justice on November 5, 1980: "I suppose I was biased, but I was sympathetic to them from the very beginning. I was very pleased that we reached the commitment that we did. I regard that as one of the better things I have been able to do as a minister. I want those houses fixed."

The Ministry is no doubt correct when it states that it had no legal responsibility to assist the homeowners, the homes having predated the Ontario New Home Warranties Plan Act which came into effect in 1977. There was, however, political pressure to assist the homeowners, and it would appear that the Minister also felt there was some moral responsibility to assist because of the registration of the builder under the New Home Warranties Program in 1977 despite the Ministry's knowledge of the homeowners' problems. Even without that extra element of responsibility, however, I have to conclude that as a result of the unequivocal and unqualified promises made to the homeowners, expectations were raised, and the Ministry must bear some responsibility for allowing the promises to go unfulfilled.

> C. **While our continued involvement with this case may have created expectations that were beyond our capacity to fill, we are not aware of anyone who suffered a loss as a result of our activities. At worst they were in the same position as they would have been in had we not intervened.** (Statements made in Mr. Crosbie's letter of December 16, 1983)

The issue raised is, of course, whether the homeowners have relied to their detriment on the Ministry's promises. The homeowners argue that they are in a worse position as a result of the promises of the Ministry for the following reasons:

(a) The homeowners refrained from doing repairs in anticipation of government assistance. As a result, the defects in some cases have worsened, and the cost of repairs in some cases may now be greater.

(b) Some homeowners refrained from selling their homes in 1981 when housing prices [locally] increased substantially, as they were waiting for the repairs to be completed prior to selling their homes, and they feel if they now sell their homes they would get less for them than what they could have received in 1981.

(c) The homeowners have refrained, to their detriment, from pursuing other avenues of appeal and options for recovery.

There would appear to be some merit to the homeowners' contention in (a) above. With respect to their claim in (b), we have not investigated whether there would be a loss in resale value, as in my opinion such a loss would be too remote from the Ministry's actions in any event. With respect to contention (c), I would note that the homeowners had exhausted almost all other avenues of appeal before getting the commitment of the Ontario Government. However, it should also be noted that the builder is still a very large builder locally, and the homeowners have a reputation of being very tenacious in their pursuit of a remedy and could possibly have pursued this matter further.

However, my decision as to whether the homeowners' complaint is supportable is not dependent on a finding of detrimental reliance, but depends on a finding as to whether the Ministry has acted unreasonably.

Based on the foregoing, it is my opinion that the Ministry:

1. unreasonably omitted to document its commitment from HUDAC and confirm this commitment in writing with HUDAC;

2. unreasonably omitted to provide HUDAC administrators with the statement of the Ministry's expectations and its knowledge of the history of homeowners' problems;

3. unreasonably omitted to notify the homeowners of the builder's offer to repair the homes;

4. unreasonably omitted to provide the homeowners with the results of the HUDAC inspections as well as written notice of its final disposition of the matter.

[Reference: Ombudsman Act, section 22(1)(b)]

Prior to discussing my recommendations, I wish to comment on two other issues which are unrelated to the representations in Mr. Crosbie's written response to our Office of December 16, 1983.

The first point is that it is clear from my review of all documentation and statements made that it was the Ministry's intention to assist all homeowners who filed deficiency lists in 1980, whether these homeowners were original or resale buyers. Any recommendation that I might make to assist the homeowners must therefore include homeowners whether they be original or resale buyers, as long as they had filed deficiency lists in 1980 as requested by the Ministry.

The other matter that must be addressed is whether any recommendation I might make regarding assistance to the homeowners should include the repair of what are commonly referred to as "cosmetic defects"

as well as the more serious structural problems. The homeowners contend that the intention in the Ministry's promises was that all defects, whether cosmetic or structural, would be remedied.

The dichotomy between the two types of defects in homes seems to arise as a result of the types of warranties under the Ontario New Home Warranties Plan Act. Under the one-year-warranty program, the builder warrants that the homes are constructed in a good and workmanlike manner; are free from defects in material; are fit for habitation; and are constructed in accordance with the Ontario Building Code. Any defects as a result of poor workmanship or materials are covered under the one-year warranty, other than defects as a result of normal wear and tear or normal shrinkage of materials caused by drying. These are generally what are considered "cosmetic defects". Under the five-year warranty, only damage that has been caused as a result of any major structural defect would be compensated within this period. "Major structural defect" is defined in the regulations to the Act and generally means the failure of the load-bearing portion of the building, or defects which materially affect the use of the building, such as cracks in basement walls, collapse or serious distortion of joints or roof structure. It should be emphasized that damage must be suffered from a structural defect before recovery is possible.

It would appear that in attempting to implement the repair program, the Ministry and HUDAC officials were primarily concerned with those defects which could be categorized as structural defects and only if these defects had resulted in identifiable damage. This is evident from Mr. A's comments throughout, as well as HUDAC's summary of the inspection reports. HUDAC did conclude, however, that "for the most part these homes were built in accordance with the building standards at the time of construction", and that "most of the problems mentioned by homeowners, while no doubt annoying, cannot be considered serious". HUDAC concluded that the "only problems which can be considered potentially serious are those relating to roofs and one or two foundations".

The homeowners, of course, point to Mr. Drea's comments when they argue that it was intended that all defects, whether substantial or insubstantial, would be covered. This was what the homeowners were complaining about when they talked about the dichotomy between Mr. Drea's promises and what the Ministry officials said would be done. From a review of Mr. Drea's statements, there is some evidence to support the homeowners' position. However, I cannot conclude that Mr. Drea, when making his promises to the homeowners, ever really put his mind to the distinction between the types of defects contemplated under the Act. I feel his statements must be viewed more as general assurances that the homes would be looked at by HUDAC, and that those defects that HUDAC determined should be repaired would be repaired. HUDAC, as noted, felt that only the major defects were worthy of concern.

It is now at least twelve years since these houses were built, and they have, no doubt, undergone deterioration due to normal wear and tear. It would be very difficult to determine, at this point, which defects relate to original construction. Accordingly, it is my conclusion, based on the foregoing, that it would be unreasonable to make any recommendation with respect to the repair of cosmetic defects. This decision is also influenced by the evidence that shows that these homes have increased substantially in value since their purchase in 1971 and 1972.

I would also like to note that out of the original 365 homeowners who petitioned the Legislature, 144 filed the required deficiency lists in 1980 and thus were eligible for the promised assistance. Since 1980, I am advised by the Homeowners' Association, the 144 homeowners have now been reduced to 24 homeowners who are still interested in some form of assistance from the government, and who were homeowners in August of 1979 when Mr. Drea originally made his promises. Many of the homeowners who had originally petitioned the Legislature and who filed deficiency lists have since sold their homes and moved out of the neighbourhood. The complainant, on behalf of the homeowners, has indicated that he feels that only those homeowners who have expressed an interest in still receiving some assistance from the government, and who were homeowners at the time the original promises were made, should be eligible for assistance and should be advised of the results of the inspection of their homes.

It is, therefore, my recommendation that:

1. (a) The Ministry reopen its file on the matter and take whatever steps are necessary to review the HUDAC and related inspection reports for those houses which are owned by persons who originally filed a deficiency list and who are still interested in some form of assistance from the Ministry. (It shall be the Homeowners' Association's responsibility to advise the Ministry of the names of these persons.)

   (b) Following this review, I recommend that the Ministry, at no cost to the homeowners, repair those homes which had suffered damage as a result of a major structural defect relating to original construction.

   (c) If any of the above-noted homeowners have repaired damage caused by major structural defects relating to original construction, then these homeowners should be compensated for their repair costs upon proof of payment.

[Reference: Ombudsman Act, section 22(3)(g)]

2. The Ministry should send reporting letters to those homeowners who are still interested (as indicated to the Ministry by the Homeowners' Association), and who originally filed deficiency lists. The letters should indicate the matters about which the homeowners complained as well as the corrective work intended.

[Reference: Ombudsman Act, section 22(3)(b) and (f)]

My report was sent to the Ministry on August 1, 1984. Following the issuance of this report, the Ministry contacted my Office for clarification on two counts. The first was whether the Ministry could assume that the number of homeowners who were still interested in some form of assistance was limited to 24 persons. The Ministry was advised by letters dated October 15 and October 23, 1984 from my Office that the number 24 was an estimate and in fact the complainant had recently provided the Ministry with a list of 26 homeowners who still expressed some interest in the matter. I advised that although the latter number of homeowners might give an indication of the extent of the coverage the Ministry might have to consider, it was my recommendation that if other homeowners not on that list of 26 homeowners came forward and requested assistance and were otherwise qualified, they too should be eligible for compensation.

The second point raised was the meaning of "major structural defect" in my recommendations. It was acknowledged by Ministry officials that when the HUDAC inspectors were reviewing the defects in the homes, they were not necessarily considering only those defects which could legally be called "major structural defects" under the Ontario New Home Warranties Plan Act, but were also considering and noting those defects which could be considered "substantial defects" as opposed to minor defects or annoyances, and that it had been the position of both HUDAC and the Ministry that those homeowners suffering substantial defects should be eligible for recovery. This had been my intention when making my recommendations and for the purpose of certainty, I advised the Ministry in a letter dated October 15, 1984 that my recommendations would be amended as follows:

It is, therefore, the Ombudsman's recommendation that:

1. (a) The Ministry reopen its file on the matter and take whatever steps are necessary to review the HUDAC and related inspection reports for those houses which are owned by persons who originally filed a deficiency list and who are still interested in some form of assistance from the Ministry. (It shall be the Homeowners' Association's responsibility to advise the Ministry of the names of these persons.)

(b) Following this review, I recommend that the Ministry, at no cost to the homeowners, repair those homes which had suffered damage as a result of a major structural defect relating to original construction or in which there exist substantial defects relating to original construction as reflected in the HUDAC inspection reports.

(c) If any of the above-noted homeowners have repaired damage caused by major structural defects relating to original construction, or any substantial defects relating to original construction, as reflected in the HUDAC reports, then these homeowners should be compensated for their repair costs upon proof of payment.

[Reference: Ombudsman Act, section 22(3)(g)]

2. The Ministry should send reporting letters to those homeowners who are still interested (as indicated to the Ministry by the Homeowners' Association), and who originally filed deficiency lists. The letters should indicate the matters about which the homeowners complained as well as the corrective work intended.

[Reference: Ombudsman Act, section 22(3)(b) and (f)]

I received written representations from the Deputy Minister, Mr. Crosbie, on January 5, 1985. He advised that his Ministry was not prepared to implement my recommendations. On February 12, 1985, I wrote to him commenting further on his representations and advising him that a copy of my report and his letter of January 5, 1985 were being sent to the Premier pursuant to section 22(4) and (5) of the Ombudsman Act.

DETAILED SUMMARY NO. 2

The complainant registered his complaints against the Ministry of Community and Social Services and the Social Assistance Review Board in September, 1983. He contended that the decisions of the Director of Income Maintenance and subsequently the Social Assistance Review Board to cancel his Family Benefits on the grounds that he was no longer considered to be a permanently unemployable person, were unreasonable.

On October 6, 1983 the Deputy Minister of Community and Social Services and the Chairman of the Social Assistance Review Board were advised of the Ombudsman's intention to investigate the complainant's concerns. They were also invited to provide this Office with a statement of their organizations' positions with respect thereto.

On October 17, 1983 we received a response from the Chairman indicating that he had reviewed the complainant's file and had found that on the basis of the evidence before the Board, the members were correct in affirming the decision of the Director of Income Maintenance to cancel the complainant's assistance. Furthermore, following a reconsideration hearing by the Board on May 19, 1983, the Board had, in the Chairman's view, appropriately affirmed its original decision. No response was received from the Deputy Minister.

During the course of our investigation, the files of the Ministry's Income Maintenance Branch and the Social Assistance Review Board were reviewed in detail. In addition, interviews were conducted with the the complainant; the complainant's former field worker, Mr. A; the Ministry's Family Benefits Supervisor, Ms. B; the local Welfare Administrator, Mr. C; the Ministry's Family Benefits General Manager, Mr. D, and the Ministry's Overpayments Records Clerk; and the complainant's physician, Dr. E.

Our review of the complainant's Family Benefits file revealed that based on the information which was before the Director of Income Maintenance and the Social Assistance Review Board at both of its hearings, none of their respective decisions could be considered unreasonable. However, after conducting a careful review of all of the evidence pertaining to the complainant's concerns, I wrote to the Deputy Minister of Community and Social Services on June 7, 1984 and in accordance with section 19(3) of the Ombudsman Act advised him of the information which had been gathered during the course of our investigation, including the following facts:

The complainant began receiving Family Benefits in 1970 as a permanently unemployable person. His medical eligibility was reviewed several times in later years including 1972, 1974, 1977, and February, 1982. All of these reviews confirmed that the complainant was considered to be permanently unemployable.

In March, 1982, Mr. A became the complainant's field worker. Mr. A has advised this Office that he became concerned about the complainant's eligibility for Family Benefits on medical grounds because he had seen the complainant performing body work on a number of cars parked on his property. He advised that he had seen him carrying a tool box, lifting tires, and bending under the hood of a car. Mr. A indicated that he was concerned that if the complainant could do all of these things, then he was capable of obtaining full-time employment. Secondly, since the complainant seemed to be working on other people's cars, Mr. A was concerned that the complainant could have been receiving undeclared income.

On July 16, 1982, Mr. A met with the complainant at his home following which he completed a Special Report for the Medical Advisory Board, stating that in his opinion the complainant was employable.

On July 19, 1982, Mr. A received a completed Medical Form 4 from the complainant's physician, Dr. E, which indicated that the complainant was permanently unemployable for medical reasons. According to Mr. A, he met with Dr. E on the same day and Dr. E advised him that the complainant was in his opinion, a malingerer. Mr. A wrote a memorandum on his conversation with Dr. E and sent it along with a Field Worker's Special Report and the Medical Form 4 to the Medical Advisory Board on August 20, 1982.

The Medical Advisory Board received this information from Mr. A on October 8, 1982 and on the same day, issued a report to the Director of Income Maintenance that in its view, the complainant was not permanently unemployable. In a memo dated October 8, 1982 the Medical Advisory Board acknowledged the field worker's report of Dr. E's comments.

On December 1, 1982, the complainant did not receive his cheque from the Ministry, so he called the District Office to make inquiries. He has advised us that a worker told him that he was not going to get his cheque any more but refused to give an explanation. We determined that the complainant was not provided with notice that his allowance was to be terminated, as is required under section 13(1) and (3) of the Family Benefits Act. In addition, his inquiries at the District Office with respect to the reasons for the termination were unsuccessful. I note however, that in response to inquiries by my investigator, the Ministry has recently paid the complainant his entitlement for November, 1982.

The complainant filed an appeal with the Social Assistance Review Board on December 2, 1982. He requested a hearing regarding the termination and complained on the form that he had received no notice of the Ministry's decision to cancel his assistance. He also complained that he had received no notice of the cancellation and he requested interim assistance. The hearing was held on January 18, 1983 and we have confirmed that the Director's written submission of that same date was given to the complainant immediately before the hearing by a Board official. He received no prior indication of what the Director's submission would contain and therefore, had little opportunity to address the concerns expressed by the Director of Income Maintenance. A copy of the complainant's Appeal Form 1 was sent by the Review Board to the Director and then on to the District Office where the Director's submission was written.

This submission consisted of a history of the complainant's involvement with Family Benefits and stated that a review of his medical file was completed by the Medical Advisory Board which reported to the Director as follows:

The Medical Advisory Board reviewed a single 004 dated 19.7.82 and an 011 dated 16.7.82.

The gentleman is obese and stated to have gastric hyperacidity (- symptoms of pain in shoulders and back, etc. - have been extensively investigated for which no cause can be found).

Prognosis - fair - doctor weekly to correct medication - no recorded hospitalization.

Educational level not stated - or work history - however does housework, yard work, and body work on old cars - no disability noted - still drives 3/4 ton van and four cars. Board does not advise he is unemployable.

The submission stated that the Director had accepted the Medical Advisory Board's opinion and withheld the allowance for November, 1982 and cancelled it effective December, 1982. There was no reference in the Director's submission to the letters which are normally sent to a recipient providing the required notice that his assistance is to be terminated. No reference was made to the report of the field worker or the comments made by Dr. E, although it is clear from the Ministry's file that the Medical Advisory Board and the Director of Income Maintenance considered the field worker's memorandum of July 19, 1982 indicating that Dr. E felt that the complainant was malingering.

I carefully reviewed all of the medical evidence on file in addition to these most recent reports submitted by the field worker and it appeared to me that the medical information in the Medical Form 4 dated July 19, 1982, was essentially the same information which was already in the Ministry's file and reviewed frequently between 1972 and February, 1982. It was my view that in his submission to the Review Board, the Director of Income Maintenance withheld from the Board and the complainant relevant facts which he considered in making his decision (i.e. the field worker's report on his conversation with Dr. E).

On the basis of the foregoing, I tentatively concluded pursuant to section 22(1)(a) and (b) of the Ombudsman Act that:

1. The Review Board acted unreasonably in failing to consider the complainant's application for interim assistance.

2. The Review Board acted unreasonably in failing to consider that portion of the complainant's appeal relating to the lack of notice given regarding the termination of his assistance.

3. The Review Board's decision to proceed with the hearing, notwithstanding the fact that the complainant had just received the Director's submission a few moments prior to the hearing, was unreasonable.

4. The Director's failure to provide the complainant with written notice of his proposal to cancel his assistance together with his reasons therefor was an omission which appears to have been contrary to law - specifically, section 13(1) of the Family Benefits Act.

5. The Ministry's failure to provide the complainant with a reasonable opportunity to examine the Director's submission prior to the hearing was an unreasonable omission.

6. The Director of Income Maintenance acted unreasonably in failing to include in his submission to the Review Board all the relevant facts which were considered in making the decision to cancel the complainant's assistance.

I tentatively recommended pursuant to 22(3)(g) of the Ombudsman Act that:

1. The Review Board should take steps to ensure that all issues brought to the attention of the Board by an appellant on the Appeal Form 1 are addressed by the Board at the hearing.

2. The Director of Income Maintenance should take specific steps to ensure that his submissions to the Social Assistance Review Board are provided to all appellants at such a time and in such a manner that a reasonable opportunity is provided to them to understand the Director's decision and prepare for the hearing.

3. In cases where it appears that an appellant has not been provided with a reasonable opportunity to examine the Director's submission prior to the hearing, the Review Board should advise the appellant that he may request an adjournment until such time as he has had a reasonable opportunity to examine the Director's submission in order that an adequate hearing may be held.

4. Where the appellant requests an adjournment, the Review Board should discuss with the appellant his financial situation, advise him that he may apply for interim assistance under these circumstances and, if financial hardship is apparent, direct the Director to pay the appellant interim assistance until a decision is reached by the Board.

5. The Director of Income Maintenance should advise the complainant of all of the relevant considerations which were taken into account at

the time of the decision to terminate his assistance, particularly the information reported by the field worker concerning his observations of the complainant working and the statements obtained from his family physician.

6. The Director of Income Maintenance should take steps to ensure his submissions to the Review Board contain a complete and fair account of the facts considered by the Ministry in reaching the decision which is the subject of the appeal.

....

On June 7, 1984 I wrote to the Deputy Minister of Community and Social Services and the Chairman of the Social Assistance Review Board and in accordance with section 19(3) of the Ombudsman Act invited them to make representations with respect to these tentative conclusions and recommendations.

Before reaching a final conclusion on this case, I have carefully considered the representations made by the Chairman in his letter of June 18, 1984 and the Assistant Deputy Minister, Ministry of Community and Social Services, in his letter of July 24, 1984.

With respect to my first possible conclusion, I note that the Chairman has agreed that the Board failed to deal with the appellant's request for interim assistance. The Chairman has informed me that administrative changes have recently been made to ensure that in the future, applications for interim assistance will not be overlooked. In view of this response, it would appear that a formal recommendation by me is not necessary.

With regard to my second possible conclusion, I note that the Chairman has also agreed that in its decision, the Review Board should have commented on the Ministry's procedural error in not providing the complainant with the proper notice of intent to cancel. This was a matter that was brought to the attention of the Board by the complainant in his Appeal Form 1. The Chairman has stated however, that inasmuch as the appellant chose to proceed with the hearing on the substance of his eligibility, the Board addressed itself to that issue and rendered its decision on the basis of the evidence. The Chairman has not made reference to my first possible recommendation that the Review Board take steps to ensure that all issues brought to the attention of the Board by an appellant on an Appeal Form 1 are addressed by the Board at the hearing.

In dealing with my third possible conclusion regarding the Board's decision to proceed with the hearing even though the complainant had just received the Director's submission, I note that the Chairman has

advised me that under such circumstances it is the standard practice of the Board members to inform the appellant that he or she has the option of requesting that the hearing be rescheduled or adjourned for a short period to enable the appellant to study the submission. The Chairman spoke with the presiding member at the complainant's hearing and was assured that this is her normal practice; he stated that he had no reason to doubt that it was done in this case. It would appear that the complainant elected to proceed with the hearing and it is the Chairman's view that the Board should not now be faulted for having acceded to the complainant's request. I note that in response to my third possible recommendation on this matter the Chairman has advised that he proposes to remind members of the Board of the importance of recording that an adjournment was offered where the appellant indicates that he has not had adequate time to review the respondent's submission.

I note that the Chairman has rejected my fourth possible recommendation even though he has acknowledged that there have been instances where the Board has proceeded as I have recommended. I am not persuaded by the Chairman' representations on this issue as he has not demonstrated why payment of interim assistance should not be considered as a matter of routine in cases where an appellant who has shown financial hardship, has not been given reasonable opportunity to review the Director's submission, and thus prepare for the appeal. Although the costs of such a procedure may at first appear to be a matter of some concern, the Assistant Deputy Minister has advised me that it is only in exceptional cases that there is a delay in the delivery of the Director's submission. Thus, the financial implications would not appear to be significant.

With respect to my fourth possible conclusion, I note that the Ministry agrees that written notice required under the Family Benefits Act was not sent to the complainant due to an administrative error. We have been advised by the Assistant Deputy Minister that the complainant has now received the assistance to which he was entitled and Ministry officials have reviewed the matter with the appropriate staff involved and trust that similar situations will not occur in the future. The Assistant Deputy Minister expressed his sincere regret for any inconvenience caused to the complainant. I have accepted the Assistant Deputy Minister's statements in this regard and it would appear that in view of the Ministry's actions, no formal recommendation by me is necessary in this regard.

Concerning my fifth possible conclusion and my second possible recommendation concerning the Ministry unreasonably omitting to provide the complainant with a reasonable opportunity to examine the Director's submission, I note the Ministry's position that it is only in exceptional cases that a copy of the Director's submission to the Social Assistance Review Board is not provided to the appellant in a timely manner. We

have been advised that in the complainant's case the delay was primarily the result of the late completion of the medical summary by the Medical Advisory Board which is essential to completing the Director's submission to the Review Board. The Assistant Deputy Minister has advised my Office that it has anticipated that this problem will be addressed with the recent decentralization of the Medical Advisory Board. The Ministry appears to be of the view that no specific action by the Director of Income Maintenance is necessary to ensure that his submissions to the Review Board are provided in a timely manner.

It may well be that the new administrative procedures which have been developed as a result of the Ministry's decentralization will assist in reducing the number of delays of this kind. However, it is my opinion that although an appellant has the right to request an adjournment in cases where he or she has not received a copy of the Director's submission until immediately prior to a hearing, this is not a practical or reasonable alternative for an appellant because of the costs involved in a delay. It is my view that this is a problem which should be addressed by the Ministry as an appellant should not be penalized for a delay on the part of the Ministry which is well beyond the appellant's control.

Finally, with regard to my sixth possible conclusion concerning the Director's submission to the Social Assistance Review Board, I note the Ministry's position that all the relevant facts were presented in a fair manner in the Director's submission to the Review Board. The Assistant Deputy Minister has advised me that in his opinion it was not appropriate to disclose Dr. E's comments to the field worker that in his view, the complainant was malingering as the Ministry considered this to be confidential information provided by a third party. The Ministry felt that if released, this information might prove detrimental to the third party and in addition the Ministry had no authority to release such information. The Assistant Deputy Minister rejected my sixth possible recommendation that the complainant be advised of all of the relevant considerations which were taken into account at the time of the decision to terminate his assistance.

I do not accept the Assistant Deputy Minister's position that the complainant ought not to be advised of the information provided by the Ministry field worker to the Medical Advisory Board concerning Dr. E's statement. The field worker's report clearly influenced the recommendation of the Medical Advisory Board and the decision of the Director of Income Maintenance to cancel the complainant's assistance. It is my opinion that in all cases, applicants and recipients should be provided with a fair account of the evidence which was considered by the Director in reaching his decision. Although there may be occasions when in the interests of the client, applicant/recipient certain medical information ought not to be released for good and proper medical or other reasons, this does not appear to be one of those cases.

I also do not agree with the Assistant Deputy Minister that the Ministry has no authority to release medical information on file to an applicant/recipient and it is my understanding that the Family Benefits Act contains no confidentiality requirements in this regard. I am in agreement with the Honourable Mr. Justice Krever who stated in his Report of the Commission of Inquiry into the Confidentiality of Health Information that "there is a discernable trend toward an individual's right of access to personal information about himself or herself including his or her own health information". I note that Mr. Justice Krever has taken the position in his Report that individuals should have a right of access to his or her medical records maintained by health care providers. I note that since 1981 the Workers' Compensation Board has provided all claimants with access to the medical information contained in the Board's files.

I also note that in the recent case of Re Stumbillich et al. and Health Disciplines Board et al. 44 O.R. (2d) 196, the Divisional Court held that the Health Disciplines Board must comply with the duty to act fairly and give the complainant access to the documents before the Board which were the basis for the decision to be reviewed. Mr. Justice Osler, speaking for the court stated at page 204 that: "There is little point in looking to the parties for representations which will help the board in reaching its conclusion if the parties do not have available to them the documents before the Board on which the conclusion being reviewed had been reached." The Divisional Court's decision was recently upheld by the Court of Appeal. In an oral judgment, Thorson, J. A. stated in part as follows:

> It was thus incumbent upon the Board ... to provide the complainant with access to the documents in question in order that she might be in a position to ask any questions about them that she considered ought to be asked, respond to any statements or explanations made by either the respondent or the College's representative, and reply to any questions that either of them might see fit to put to her. Without such access, and thus lacking any direct knowledge of what the documents might contain or show, it is difficult to imagine how the complainant could be expected to prepare herself to do any of these things. Accordingly, in our opinion fairness required that the documents be made accessible to her.

Furthermore, in earlier the case of Re Downing and Graydon et al. (1978), 21 O.R. (2d) 292, it was held by the court that the requirements of natural justice and, in particular, the audi alteram partem rule, must be complied with, and the investigating officers were required to disclose to the complainant any information on which the officers' ultimate decision was based, particularly if it was adverse to the complainant. This case involved an investigation of a complaint under the Employment Standards Act.

Although there may be factual differences between these cases and the circumstances involved in Family Benefits applications, it is my view that the rules of fairness as outlined in these cases merit serious consideration in the context of the procedures used by the Ministry of Community and Social Services in advising applicants/recipients of the original decisions of the Director of Income Maintenance and in preparing submissions to the Social Assistance Review Board. In my opinion, it is incumbent upon the Director of Income Maintenance to fully advise applicants/recipients of the information which was considered by the Director in reaching his decision as well as to provide the Review Board with a fair account of this same evidence.

In accordance with the the provisions of sections 19(3) of the Ombudsman Act, I wrote to the complainant's physician, Dr. E on September 10, 1984 and advised him that in order to make a complete report on the results of my investigation of the complaints, it appeared to be necessary that I refer in my report to the field worker's written report that Dr. E had stated that the complainant was malingering. In view of the possibility that such a report might adversely affect Dr. E, I invited his representations. On October 1, 1984 I received a letter from Dr. E advising that although he had no objection to my including this information in my report, he would like to make it clear that the field worker misquoted him and "grievously erred in stating that I had said that the complainant was malingering.... Such a statement would be unfair, untrue and unjust in the circumstances". Dr. E advised me that he had reported to the field worker that although the complainant does not have an easily defined illness, he has repeatedly and earnestly stated that he is unable to work and Dr. E has no reason to disbelieve him. I have taken careful note of all of Dr. E's representations.

After considering all of the representations made by the Deputy Minister and the Chairman of the Social Assistance Review Board, I have determined pursuant to section 22(1)(a) and (b) of the Ombudsman Act that:

1. The Social Assistance Review Board acted unreasonably in failing to consider the complainant's application for interim assistance.

2. The Social Assistance Review Board acted unreasonably in failing to consider that portion of the complainant's appeal relating to the lack of notice given regarding the termination of his assistance.

3. The Social Assistance Review Board's decision to proceed with the hearing, notwithstanding the fact that the complainant had just received the Director's submission a few moments prior to the hearing, was unreasonable.

4. The Director's failure to provide the complainant with written notice of his proposal to cancel his assistance together with his

reasons therefor was an omission which appears to have been contrary to law - specifically, section 13(1) of the Family Benefits Act.

5. The Ministry's failure to provide the complainant with a reasonable opportunity to examine the Director's submission prior to the hearing was an unreasonable omission.

6. The Director of Income Maintenance acted unreasonably in failing to include in his submission to the Social Assistance Review Board all the relevant facts which were considered in making the decision to cancel the complainant's assistance.

I also recommend pursuant to section 22(3)(g) of the Ombudsman Act that:

1. The Director of Income Maintenance should take specific steps to ensure that his submissions to the Social Assistance Review Board are provided to all appellants at such a time and in such a manner that a reasonable opportunity is provided to them to understand the Director's decision and prepare for the hearing.

   In this regard, I recommend in light of the Assistant Deputy Minister's most recent representations that the Ministry monitor this aspect of the appeal process by recording the dates on which the Director's submissions are sent to appellants over the next six months indicating the reasons for any delays which occur, and advise me in six months of the results.

2. In cases where it appears that an appellant has not been provided with a reasonable opportunity to examine the Director's submission prior to the hearing, the Review Board should advise the appellant that he has the right to request an adjournment and apply for interim assistance to be paid until such time as he has had a reasonable opportunity to examine the Director's submission in order that a proper hearing may be held.

3. Where the appellant requests an adjournment on these grounds, the Review Board should discuss it with the appellant and explain to him that the criterion for interim assistance eligibility is demonstrated financial hardship. If financial hardship is apparent, the Review Board should direct the Director to pay the appellant interim assistance until a decision is reached by the Board.

4. The Director of Income Maintenance should advise the complainant of all of the relevant considerations which were taken into account at the time of the decision to terminate his assistance, particularly the information reported by the field worker concerning his observations of the complainant working and the statements obtained from his family physician.

5. The Director of Income Maintenance should take steps to ensure his submissions to the Social Assistance Review Board contain a complete and fair account of the facts considered by the Ministry in reaching the decision which is the subject of the appeal.

Finally, in view of Dr. E's representations to this Office that he did not report to the field worker that the complainant was a malingerer, and since this information was a major factor in deciding to cancel the complainant's assistance, I strongly suggest that if the complainant reapplies for Family Benefits, his application be considered without regard to the field worker's report. I make this suggestion also in view of the fact that Ministry officials have advised my Office that Mr. A's performance as a field worker with the Ministry did not meet required standards and his employment at the district office ended sometime later.

My final conclusions and recommendations were reported to the Ministry and the Social Assistance Review Board on October 26, 1984.

I received personal and written representations from the Review Board on November 19, 1984 and January 2, 1985, respectively. Written representations were received from the Deputy Minister of Community and Social Services on January 10, 1985. On March 28, 1985, I wrote to the Ministry and the Review Board to advise them of the recommendations with respect to which I thought their responses were not adequate or appropriate.

I exercised my discretion under section 22(4) and (5) of the Ombudsman Act and referred the matter to the Premier on March 28, 1985. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 3

The complainant contacted our Office by letter dated September 16, 1982. He requested that the Ombudsman assist him in his efforts to obtain a complete investigation and hearing into the manner of his departure in 1979 from employment with the Investigations staff of the Liquor Licence Board of Ontario.

On October 15, 1982, the Ombudsman wrote to the Chairman of the Liquor Licence Board of Ontario and advised him of his intention, pursuant to section 19(1) of the Ombudsman Act, to investigate the complaint.

In his letter the Ombudsman outlined the complainant's contention that he had been improperly pressured into resigning from his position of inspector with the Liquor Licence Board of Ontario. The resignation came following a July 23, 1979 hearing before the Discipline Committee of the Liquor Licence Board of Ontario. At that meeting the issues discussed were the presence of minor mileage discrepancies in the reports submitted by the complainant, and in particular a statement of complaint allegedly signed by Mr. J, the licensee of a tavern regularly inspected by the complainant.

The complainant contended that the hearing was not fair or proper, as he had not been permitted to be represented by his own lawyer or to call witnesses. According to the complainant his lawyers had been advised by a member of the Board that Mr. J's statement was the main reason for the Board seeking his termination. However, the complainant pointed out that the Board had been in possession of the statement for almost ten months before it took action against him.

It was the complainant's belief that Mr. J had not filed a complaint against him, and in fact Mr. J had stated to him that he was pleased with the manner in which the complainant had carried out his duties as an inspector. The complainant alleged that the statement had been composed by two inspectors of the Board, Mr. B and the late Mr. C, and had been signed by Mr. J's wife out of fear of the two inspectors. In addition, the complainant said that he had been advised by Mr. C that Mr. B had later added a paragraph to the statements, under the signature.

The complainant also noted that the Board's estimates of his distances travelled were incorrect by as much as 100 per cent in some cases.

He pointed out that other employees under the same circumstances had received only a 90-day suspension.

In summary, the complainant contended that the Board had acted in an unfair and unreasonable manner, and that he had been made a scapegoat during an OPP probe into improper practices by Liquor Licence Board inspectors.

Mr. A, Director of Administration for the Board, responded to the Ombudsman's letter on November 12, 1982, and a copy of this letter was sent to the complainant for his comments. The file was assigned to a member of my investigative staff, and later reassigned to another member of my investigative staff.

The investigation of this complaint included interviews with present Liquor Licence Board personnel, including the individual who investigated the allegations against the complainant; union officials;

the solicitor for the union; the complainant's supervisors and co-workers; the complainant's solicitor, Mr. K; an Examiner of Questioned Documents; Mr. J; and the complainant. In addition, relevant Board files and the Ontario Manual of Administration were reviewed, as well as relevant legislation and other applicable law.

During the course of the investigation it became apparent that I could not support some aspects of the complainant's contentions. Mr. J confirmed to my investigator that the signature on his statement of complaint is his. A handwriting analysis of this signature by an Examiner of Questioned Documents, also indicates that the signature is genuine.

Mr. B's recollection regarding the added paragraph to Mr. J's complaint is that the paragraph was added in Mr. J's presence. Mr. C is deceased, and there is no evidence to support the complainant's contention that this paragraph was added to the statement when Mr. B returned to the Board office.

Finally, independent random tests carried out by my Office supported, on those routes checked, the Board's estimates of the complainant's mileage. I therefore cannot support the complainant's contentions regarding the Board's estimates of his distances travelled.

The investigation therefore focused on the circumstances surrounding the complainant's departure from his position with the Board. In this regard, I came to the following possible conclusions and possible recommendations, and so advised the Chairman in a letter dated May 7, 1984:

Possible Conclusions:

The actions of the Liquor Licence Board of Ontario were unreasonable in the matter of the complainant's departure from employment with the Board in that:

1) The complainant was pressured into resigning by the Board and was therefore in effect dismissed.

2) The Board's decision to dismiss the complainant was unreasonable as the allegations against him did not warrant such severe discipline under the circumstances.

3) The Board failed to follow fair procedures in arriving at its decision to dismiss the complainant, and further, that the Board did not properly follow its own policies with respect to disciplinary procedures.

[Reference: Ombudsman Act, section 22(1)(b)]

Possible Recommendations:

1) The Liquor Licence Board of Ontario should compensate the complainant by an amount equal to one full year's salary from which shall be subtracted the two months' salary already received as severance, the value realized by him when he purchased the Board vehicle at wholesale cost, and additionally, an amount equal to 90 days' salary in view of the remaining allegations against him concerning expenses and the manner in which he carried out his duties.

2) The Liquor Licence Board of Ontario should establish fair and reasonable disciplinary procedures in compliance with the Manual of Administration where they are not in place at present and such procedures should be strictly adhered to in future.

[Reference: Ombudsman Act, section 22(3)(d) and (g)]

I based my possible conclusions and recommendations on the following information.

The complainant had been hired by the Liquor Licence Board of Ontario as a Liquor Licence Inspector in 1972. His personnel file indicated that he was an acceptable employee and did not require formal discipline prior to the events which took place in 1979.

In October of 1978, two investigators for the Liquor Licence Board attended at the establishment of a licensee, Mr. J, and obtained a signed statement from him alleging that the complainant regularly ate at his restaurant and did not pay. Additionally, an investigation was conducted by these investigators on the activities of the complainant, and a fellow inspector, Mr. D. The report of the investigation regarding the complainant was quite lengthy and concerned a wide variety of subjects, including the complainant's expense claims and the manner in which he performed his duties. The signed statement by Mr. J was included in this report by the investigators.

On June 25, 1979, the complainant received a hand-delivered notice which required his presence on the following day at an investigative hearing into his activities as inspector. This notice did not mention Mr. J's statement. At the investigative hearing, it would appear that the complainant denied the majority of the allegations. Regarding the J statement, he agreed that he had eaten meals at Mr. J's restaurant without paying, stated that this was common practice at the time and that Mr. J would not accept money. On the same day, another investigative hearing was held concerning the activities of Mr. D. The allegations against him were essentially similar, with the exception of the statement by Mr. J against the complainant.

Following the investigative hearing, the Discipline Committee of the Board met and considered the results of that hearing. On July 6, 1979, the Discipline Committee decided to recommend to the Chairman that the complainant be dismissed for falsification of expense accounts, excessive inspection of premises closest to his residence, conducting spot inspections with another inspector without prior approval of the Board, and accepting benefits from a licensee. The Board met on July 23, 1979 and decided to dismiss the complainant based on the findings of the investigative hearing and the recommendations of the Discipline Committee. It would appear that the Board also decided that the complainant would be given the option of resigning. The complainant resigned on July 27, 1979 on the understanding that he would receive approximately two months' salary and would be allowed to purchase his automobile at wholesale value.

My investigation showed that immediately after the investigative hearing, the complainant retained the services of a lawyer, Mr. K. Mr. K made repeated attempts to have the allegations against the complainant examined at a full hearing which would include examination of witnesses. The Board refused Mr. K's request for a full hearing and it also did not advise him of the findings of the Discipline Committee outlining the specific reasons for its recommendation to dismiss. Mr. K was able to review the report of the Board investigation and he sent written submissions regarding this report to the Board prior to its final decision.

The complainant had alleged that Mr. A, Acting Chief of Inspections at the time, and Chairman of the Investigative Hearing, threatened that the information collected against the complainant would be turned over to the police if he did not resign. Some of the individuals present at the hearing stated to my investigator that they heard Mr. A make such a statement. Additionally, Mr. E, then Personnel Manager with the Board, had stated that he told the complainant that unless he resigned, the Board would submit its information to the police and criminal charges would probably result. I noted that at the time in question, a number of the Board employees including the Chief of Inspections, Mr. F, had been charged with accepting benefits.

I noted that the allegations against Mr. D were essentially similar to those against the complainant, with the exception of the statement by Mr. J. I noted further that the Board imposed discipline consisting of a 90-day suspension without pay in the case of Mr. D.

Representatives of the Board had advised my investigator that the Board's disciplinary procedures and policies at the time were based on voluntary compliance with the Ontario Manual of Administration. I noted that in a section entitled "Discipline" the manual requires that a hearing be held with at least 48 hours' notice to the employee. The

notice requirements in the Manual further stipulate that the employee be advised fully of the specifics of the allegations against him. Additionally, the Manual states that this hearing must afford the employee a full hearing, including the right to examine witnesses. In short, the Manual contemplates what appears to be a quasi-judicial hearing where the employee has an opportunity to present his side of the story. I noted that the notice given to the complainant did not meet with these requirements as it gave him only 24 hours' notice and did not advise him of the statement made by Mr. J. Further, I noted that the complainant was not provided with the kind of hearing contemplated by the Manual.

My investigation included interviews with numerous individuals who were employed by the Board at the time, as well as others in the food and beverage industry. I am informed that in October, 1978, when Mr. J made his statement, it was common practice for inspectors as well as more senior personnel of the Board to accept courtesy from licensees. Board personnel have also advised that memoranda are circulated periodically advising employees that this practice is a criminal offence and that it is contrary to Board policy.

I also took note that immediately prior to the period in question, the complainant's superiors, Mr. F and Mr. G, as well as four inspectors from Ottawa, had been criminally charged with, among other offences, accepting benefits.

I stated, based on the foregoing, that, while I would not conclude that some manner of discipline would have been unreasonable with respect to the allegations concerning improper inspection practices and improper reporting of expenses, such discipline should have been comparable to that imposed upon Mr. D for similar breaches.

I noted that while the complainant ostensibly resigned from his job, the evidence indicated that he was threatened with possible criminal prosecution by Mr. E and possibly by Mr. A. It appeared therefore that the complainant was pressured into resigning and, in effect, dismissed.

It also appeared to me that the Board's reasons for dismissing the complainant may have been inadequate. In view of the less severe discipline imposed upon Mr. D, it appeared that the statement made by Mr. J formed the basis for the Board's decision to dismiss the complainant. I noted that the Board was in possession of Mr. J's statement for approximately ten months prior to taking any action. The implication therefore arises that the Board condoned the activities of the complainant and indicated that it did not view the alleged activity seriously enough to take immediate action. Additionally, when acceptance of courtesy seems to have been a prevalent practice on the part of Liquor Licence Board personnel, severe discipline against one individual for

activities which were generally condoned at the time appeared to be unreasonable.

I concluded by reiterating that the Board failed to follow the procedures it had adopted as policy in dealing with disciplinary problems. The complainant received insufficient notice of the investigative hearing, and the hearing itself did not live up to the requirements of the Manual of Administration. I commented that regardless of the Board's internal policies, simple fairness would have required that the complainant should have received proper advance notice of the full allegations against him, and that he should have been provided with a full opportunity to present his position.

The Chairman of the Board responded on June 4, 1984.

In his letter he denied that the complainant was pressured to resign. He noted that the complainant had almost thirty days before the Board meeting on July 23, 1979 to complain to the Chairman. The complainant had been represented by the union at the June 26 hearing, and if there had been procedural unfairness or pressure, this would have been opposed by the union. Further, he said, Mr. A had been on vacation from June 29, 1979 to August 13, 1979.

The Chairman pointed out that in a July 5, 1979 letter to the then Chairman, the complainant's lawyer, Mr. K, did not complain that pressure to resign had been applied, nor did Mr. K mention this in his subsequent letters of July 9 and July 17, 1979. He noted that the matter did not come to the Board's attention until the Ombudsman's letter of intention to investigate in October, 1982.

The Chairman quoted from the collective agreement in force at the time and stated that no grievance had been filed, nor did the complainant's union representatives raise the matter of alleged lack of specifics in the notice or the conduct of the hearing.

The Chairman stated that as a result of the complainant's decision to resign, no decision to dismiss him was necessary and therefore the conclusion that the decision to dismiss was unreasonable was academic. He noted that in any event the recommendation of the members of the initial hearing had been reviewed by the Discipline Committee and by the Liquor Licence Board.

The Chairman also noted that the June 25, 1979 letter to the complainant specified the topics to be covered and advised him of his right to be represented.

The position of the Board to my first possible recommendation therefore was that the complainant had been treated fairly by the Board, and it would be inappropriate and without justification to compensate him.

Regarding my second recommendation, the Chairman said that the collective agreement spells out the procedures and rights of employees who are covered by the collective agreement, including the right to appeal to the Grievance Settlement Board. The Chairman stated that the collective agreement takes precedence over the Manual of Administration.

Finally, the Chairman stated that the complainant's allegation that it was common practice for inspectors to accept benefits constituted an unfair slander on the other one hundred inspectors who were then employed by the Board and who were not found guilty of this practice. Similarly, the Chairman considered the complainant's allegation that Mr. A and Mr. E pressured him into resigning also to be an unfair slander, stating that the complainant had ample opportunity to seek counsel from the union and from his own solicitor regarding his rights under the collective agreement and whether or not he should resign.

My comments on the Chairman's submissions are as follows.

At the time of these events, the complainant viewed the pressure being exerted upon him as a decision made at the Chairman's level and a planned attempt to force him to leave his employment quietly. He therefore felt that any appeal to the Chairman would be futile. It also appeared to the complainant that while the union would have advanced his case, it was not enthusiastic, and was in fact relieved that the complainant chose to resign rather than pursue a grievance. Although his solicitors were aware of the pressures being applied to the complainant, their objective at the time was to obtain a hearing of the matter before the Chairman. When no such hearing could be obtained, despite numerous attempts, the complainant's solicitors sent written submissions addressing the issues outlined in the investigative report. Finally, the complainant had been told that he would likely be criminally charged if he did not resign.

The procedural irregularities of the hearing are evident on the written record of this matter. Where it is found that an employee may have resigned under pressure, and where it appears that he does not have adequate notice for the only hearing where he appears personally, it can be argued that this lack of notice forms an integral part of an unfair and unreasonable process. The fact that no one objected at the time cannot be an acceptable answer where an important issue such as dismissal procedure is concerned.

Regarding the Chairman's statement that the Board did not make a decision to dismiss the complainant, as he had resigned, I would point out that the Board's own files indicate the contrary. I refer in particular to a July 25, 1979 memo from the then Chairman to Mr. E, wherein the then Chairman notes that the complainant's employment is to be terminated. In addition, in a July 26, 1979 letter from Mr. H, Assistant

General Manager of the Board, to the complainant's solicitors, it is noted that the decision of the Liquor Licence Board regarding the complainant is that he be dismissed.

The Board advised the complainant on July 25, 1979 that he was to be dismissed, but on July 26, 1979 provided him with the opportunity of resigning.

Although the notice of investigative hearing delivered to the complainant on June 25, 1979 advised him of his right to be represented, the complainant was given less than 24 hours' notice for this hearing. In my opinion, this constitutes insufficient time to obtain legal representation.

With reference to the Chairman's statement that the collective agreement takes precedence over the Manual of Administration, I would like to point out that the Manual of Administration deals with procedures prior to any decision with respect to disciplinary action, while the collective agreement addresses the procedures to be followed after the Board has arrived at such a decision. It would appear to be eminently reasonable that the Board attempt to air the issues prior to a final decision on its part in order to avail itself of every opportunity to avoid costly and lengthy grievance procedures under the collective agreement.

Finally, the Chairman contends that the complainant had slandered former fellow employees and other personnel of the Board by stating that the acceptance of courtesy was commonplace at the Board at the time in question. Our investigation, which included interviews with numerous inspectors and former inspectors, would indicate that acceptance of courtesy was in fact the norm at the time. Moreover, Mr. E himself stated to my investigator during an interview that he told the complainant that he would likely be criminally charged if he did not resign. Mr. A has denied the alleged threats of prosecution.

In an effort to resolve the matter, on November 14, 1984 I and members of my staff met with the Chairman, members of his staff and a union representative. We were informed at that meeting that in the matter of disciplinary procedures, the Board now strictly adheres to the procedures outlined in the Manual of Administration. I therefore consider this aspect of the complaint to be resolved. After considerable discussion of the main issue raised by the complainant - his entitlement to additional compensation - the Chairman agreed to review the complaint once again and advise me of his decision.

By letter dated December 5, 1984 the Chairman advised me that the position of the Board had not changed regarding compensation for the complainant, and that the Board did not therefore consider that he was entitled to any additional compensation.

It is my conclusion, pursuant to section 22(1)(b) of the Ombudsman Act, that the actions of the Liquor Licence Board of Ontario were unreasonable in the matter of the complainant's departure from employment with the Board in that:

1) The complainant was pressured into resigning by the Board and was therefore in effect dismissed.

2) The Board's decision to dismiss the complainant was unreasonable as the allegations against him did not warrant such severe discipline under the circumstances.

3) The Board failed to follow fair procedures in arriving at its decision to dismiss the complainant, and further, that the Board did not properly follow its own policies with respect to disciplinary procedures.

I therefore recommend, pursuant to section 22(3)(g) of the Ombudsman Act that the Liquor Licence Board of Ontario compensate the complainant by an amount equal to one full year's salary from which shall be subtracted the two months' salary already received as severance, the value realized by him when he purchased the Board's vehicle at wholesale cost, and an amount equal to 90 days' salary in view of the remaining allegations against him concerning expenses and the manner in which he carried out his duties. In calculating the amount owing, the complainant's pension income should also be taken into consideration.

An approximate calculation of the amount owing was presented to the Chairman at the meeting of November 14, 1984, as follows:

Annual salary as at July 4, 1979 = $20,026		
12 months' compensation =	$20,026	$20,026
Less: 2 months' severance received =	$ 3,336	$16,690
Less: Value of Board vehicle purchased at wholesale price =	$ 800	$15,890
Less: 90 days' salary as penalty for remaining allegations =	$ 5,004	$10,886
Less: Pension payments received from August 1, 1979 to July 1, 1980 = $184 per month x 12 months =	$ 2,208	$ 8,678
Total compensation due =		$ 8,678

Interest calculation: pursuant to the Judicature Act, section 536

Recommended: Interest at the rate paid by chartered banks to their most credit-worthy customers in the month prior to the registration of the complaint with the Ombudsman (August, 1982).

Prime rate for this period (August, 1982) shall be determined according to the Bank of Canada Review.

Interest to be calculated from date of resignation.

Bank of Canada prime rate as at August 25, 1982 = 14.25%

Total Interest due:	$ 6,558.66	$ 6,558.66
TOTAL AMOUNT DUE		$15,236.66

My report was sent to the Ministry and to the Liquor Licence Board on January 3, 1985.

On March 19, 1985, I received a response to my report from the Chairman of the Liquor Licence Board indicating that the Board continued to maintain that the complainant is not entitled to any additional compensation. Consequently, my report was forwarded to the Premier on March 21, 1985, pursuant to section 22(4) and (5) of the Ombudsman Act.

DETAILED SUMMARY NO. 4

This complaint against the Residential Tenancy Commission was formally made to my Office when the complainant's MPP wrote to our Office on November 1, 1983 on behalf of the complainant, who represented a group of tenants.

On November 15, 1983, the Temporary Ombudsman, in accordance with the requirements of the Ombudsman Act, wrote to advise the Chairman of the Residential Tenancy Commission of his intention to investigate the complaint concerning a decision of the Appeal Panel of the Residential Tenancy Commission that the sale of an apartment building was bona fide. In particular, the complainant and other tenants objected to the decision because, in their opinion, the onus of proving the bona fides of the sale of the apartment building was placed on the tenants instead of the landlord. Further, the complainant complained that the decision was wrong because there was insufficient information about the sale. A copy of our letter was also sent to the Deputy Minister of Consumer and Commercial Relations.

On December 1, 1983, the Senior Legal Counsel of the Residential Tenancy Commission responded on behalf of the Chairman. The Senior Legal Counsel stated that in his opinion, the findings and conclusions made by the Commission in this matter were supportable by the evidence and by the law in that the Commission had acted properly and reasonably.

During the course of this investigation, the file maintained by the Residential Tenancy Commission was examined in detail and photocopies of all relevant documents were made. The complainant and his co-complainants were interviewed and legal research was carried out with respect to the issues under review.

After conducting a careful review of all the material relating to the complaint, I wrote to the Chairman of the Residential Tenancy Commission on April 26, 1984 and, in accordance with section 19(3) of the Ombudsman Act, invited him to make representations with respect to the following possible conclusions and recommendation.

Possible Conclusions

a) The decision of the Appeal Panel of the Residential Tenancy Commission that the sale was bona fide is unreasonable within the meaning of section 22(1)(b) of the Ombudsman Act;

b) The decision of the Appeal Panel of the Residential Tenancy Commission is unreasonable within the meaning of section 22(1)(b) of the Ombudsman Act in that it required the tenants to bring forth conclusive evidence on the bona fides of the sales transaction when it should be the responsibility of the Residential Tenancy Commission to obtain the evidence given its power of inquiry under the Residential Tenancies Act.

Possible Recommendation

Pursuant to section 22(3)(g) of the Ombudsman Act the Appeal Panel of the Residential Tenancy Commission should reconsider its decision, and obtain further evidence from the landlord on the issue of the bona fides of the transaction between [Company A] and [Company B], and in particular, the identity of the beneficial owners of [Company C] and [Company A].

During the course of our investigation, the following information was revealed.

The complainant represents a group of tenants residing in an apartment building in a community in Ontario. In September, 1981, the building was purchased by Company B from Company A. On June 23, 1982, the complainant and the other tenants of the apartment building received notice that their landlord, Company B, was seeking a rent increase of 44%. The tenants sought information pertaining to the September, 1981 sale of the apartment building and discovered that there were some overlapping directorships between Company B, Company A and a third company, Company D, which manages the apartment building.

At a hearing before a Commissioner, the tenants offered this information as evidence that the September, 1981 sale was not at arm's length and, therefore, not bona fide. The Commissioner requested information from solicitors representing the vendor and purchaser regarding the sale of the building. The solicitor representing Company A refused to identify the shareholders of the company but wrote that "neither [Company A] nor its shareholder has any interest as shareholder or otherwise in [Company B]." The solicitor representing Company B wrote that the sole beneficial shareholder of Company B is Company C, a foreign company. On the basis of these two letters, the Commissioner concluded that the sale transaction was bona fide and approved a rent increase per unit approximating 25%.

An appeal of the Commissioner's decision was heard on May 11, 1983, before an Appeal Panel. The tenants submitted that the companies had failed to provide information that supported the Commissioner's order. The Appeal Panel reviewed the evidence submitted to the Commissioner and by letter dated June 6, 1983 addressed to Company D, the Chairman of the Appeal Panel, stated:

> Furthermore, a review of the evidence from that hearing indicates that the Appeal Panel does not have satisfactory evidence to enable us to make a finding that a bona fide sale of the subject residential complex took place in September 1981 as claimed, which finding might be important in any event, but becomes vital if the evidence indicates an increase in financing took place with the advent of the sale. [Emphasis added]

Consequently, the Appeal Panel requested further submissions from all parties. The solicitor for Company B submitted a Deed, Bill of Sale and a cheque in response to the Panel's request and noted that the land transfer tax and sales tax had been paid. The solicitor for the tenants submitted that it was impossible for the tenants to garner the appropriate information with reference to the sales transaction and was unable to advance their case. As a result, the Appeal Panel found that "The tenants have failed to provide any evidence to prove their case that

the sale transaction was non arms' length and that a non bona fide sale took place." The tenants' appeal was dismissed on October 12, 1983.

With respect to this case, it is the extent of the Commission's inquiry procedure that is at issue and the approach the Act requires a Commissioner and an Appeal Panel to take. Though the Commissioner requested information from the law firm representing each company involved with the sales transaction, it is my opinion that the Commissioner's inquiry and the evidence which he accepted did not meet the Commissioner's statutory duty to "ascertain the real substance of all transactions" and given his statutory discretion to lift the corporate veil and "disregard the outward form of the transactions or the separate corporate existence of the participants," as set forth in section 93(2) of the Residential Tenancies Act. The Residential Tenancies Act gives the Commission the power and authority to investigate matters relating to the sale of residential complexes in order to fulfil its mandate. This suggests that it is unreasonable for a Commissioner to make a finding that a bona fide sale took place until any doubts which he may have had, or should have had, either as a result of the parties' submissions or his own inquiry, are resolved. Despite the information presented to the Commissioner by the tenants, the Commissioner did not ask the landlord for any evidence relating to the identity of the shareholders of the off-shore company which in turn owned the purchasing company, Company B. The landlord was the only person having access to this information which, if obtained, would enable the Commissioner to fulfil his statutory responsibilities under sections 93, 107, 108 and 109 of the Act. Rather, the Commissioner relied solely upon the letters received from the solicitors for the vendor and purchaser and concluded that the sale in question was bona fide.

The tenants appealed this decision on the basis that the Commissioner did not have sufficient information to make a finding of fact that there was a change of beneficial ownership of the building. At this level of proceedings, the tenants had the burden of proving the Commissioner's finding was in error, but the Appeal Panel reviewed the evidence before the Commissioner as well as that requested and received from the lawyer for Company B and ruled that the tenants had failed to prove their case that a mala fide sale took place. Due to the fact that the Commissioner did not require the landlord to provide any evidence on the relationship among Company B, Company A, Company C, and the beneficial owners of Company A, if any, the tenants were faced with an impossible burden of evidence to meet at the appeal level.

Although the proceedings of the Commission under the Residential Tenancies Act would appear to be of an adversarial nature, in my opinion, by virtue of section 93(2) of the Residential Tenancies Act, the Commission either through its own investigation, or through the submissions of the parties, must be satisfied that the real substance of

all transactions and the good faith of the participants has been ascertained, and that all relevant information has been gleaned. Like the Commissioner, however, the Appeal Panel did not ask the landlord, Company B, to identify the shareholders of its beneficial owner, though this information would seem to be extremely relevant to a determination of the bona fides of the sale transaction. The Commission has the duty to ascertain the real substance of a transaction and the good faith of the participants to the transaction. In this case it could not have done so without disregarding the outward form of the transaction and without knowing who the owners of Company C were. As the Appeal Panel did not consider the evidence before the Commissioner to be sufficient for it to make a finding that a bona fide sale took place, it then considered a deed, bill of sale and a cheque as satisfactory evidence of the bona fides of the sale though this additional evidence was merely documents going to the form of the transaction and not its substance. The Appeal Panel similarly did not meet its duty under section 93 of the Act.

In response to my section 19(3) letter to the Chairman, I received a written response from the Senior Legal Counsel dated August 1, 1984, and in addition, on August 21, 1984, I met with representatives of the Residential Tenancy Commission to receive further representations. In attendance were the Chairman and the Senior Legal Counsel. At this meeting the Senior Legal Counsel raised his concern that the Ombudsman, in his section 19(3) letter, was of the opinion that the Commission's proceedings were not of an adversarial nature but rather were of an inquisitorial nature. However, I explained that such was not the case, but in fact I agreed with the Commission's position that the Commission's proceedings would appear to be adversarial but with broad powers of an inquisitorial nature superimposed upon that adversarial process, as specifically provided in the Residential Tenancies Act. In my opinion, these specific inquisitorial powers in the Act should have been invoked by the Commission in the circumstances of this case to determine the true identity of the owners of Company C.

In addition, the Senior Legal Counsel stated that the standard of proof necessary to make a case at the Commission was the civil burden, with which I am in agreement. With respect to the extent of the discretion granted to Commissioners in deciding issues before it, I confirm my discussion with the Senior Legal Counsel and the Chairman wherein I indicated that from my point of view, we were not a court of appeal or conducting a judicial review of the Commission's decision, but that I am looking at the Commission's decision in terms of the Ombudsman Act.

We also discussed the question of whether in this case the issue of the arm's length nature of the transaction was withdrawn before the Appeal Panel of the Residential Tenancy Commission. I note the Senior Legal Counsel's position that this issue was withdrawn by the

complainant at the Appeal hearing. However, in my opinion, such is not the case as evident from the Appeal Panel's order, dated October 12, 1983 wherein paragraph 5, headed Grounds of Appeal states:

> The tenants appealed the order of the Commissioner, requesting the Panel to make an order reducing the amount of rental increase permitted in his order. Specifically, the tenants' single claim is that "an inquiry be made into the purchase of the apartment building by [Company B] from [Company A] to ascertain whether the purchase was a non arms' length transaction." (Quote is from notice of appeal filed by the tenants.) Two other issues were listed in the tenants' notice of appeal, namely, that the Commissioner failed to allow the tenants to introduce evidence regarding the standard of maintenance and repair; and, secondly, that the Commissioner failed to make sufficient inquiry to ascertain the real substance of the sale transaction. Both of these issues were withdrawn by the tenants at the hearing and hence have not been considered by the panel.

I further refer to paragraph 24 of the said order, headed Conclusions, which states:

> The only ground of appeal entered by the tenants is that the sale transaction is not arms' length and hence the sale was non bona fide.

Thus, the central issue of the arm's length nature of the transaction between Company A and Company B was presented by the tenants at the Appeal hearing. It would appear that my disagreement with the Senior Legal Counsel with respect to this point may arise from the fact that a third issue "that the Commissioner failed to make sufficient inquiry to ascertain the real substance of the sale transaction" was withdrawn by the tenants at the Appeal hearing. In my opinion, this third issue was properly withdrawn by the tenants as it was merely repetitive of the central issue of the arm's length nature of the transaction between the corporate vendor and purchaser and thus redundant. But the withdrawal of this third issue does not constitute the withdrawal of the issue of the arm's length nature of the sale transaction, as is clearly evident from a reading of the Appeal Panel's order.

As a result of this meeting, the Chairman indicated he was prepared to refer this matter to the Appeal Panel for reconsideration and I agreed to hold the case in abeyance until the Appeal Panel did so. In a letter received from the Chairman on September 11, 1984, he advised that he caused a request to be made to the Appeal Panel of the Commission in this case to reconsider its decision of October 12, 1983. However, he

advised that he received a memorandum dated August 24th from the Registrar of Appeals, which stated that the Appeal Panel had considered the request to rehear, but had unanimously rejected the suggestion that an error was made and had consequently refused to rehear this appeal. I note that the Residential Tenancies Act provides no power to the Commissioner or otherwise to require the Appeal Panel to rehear a matter previously decided by it. The only power of rehearing is a limited power found in section 117(9) of the Act which gives an Appeal Panel limited power to rehear an appeal on its own motion, where in its opinion there has been a serious error.

In my opinion, it was the duty of the Residential Tenancy Commission, in reaching a decision on the real merits and justice of this case, to ascertain the real substance of this transaction and activity relating to this apartment building, and the good faith of the participants. In performing this duty, the Commission and its Appeal Panel may pierce the corporate veil. In this case, the Commission has the statutory power to inquire into the true owners of Company C, and in my opinion, without knowing the true owners of Company C, the Commission could not truly say it knew the real substance of the transaction and the good faith of the participants. In an adversarial system the party alleging an issue must prove it, but in proceedings before the Commission, section 93 of the Act clearly contemplates that the Commission's powers of inquiry may be invoked with respect to issues such as the bona fides of the landlord and the true nature of the corporate transaction affecting the tenants' rent. In the case at hand, the tenants could not possibly provide evidence on the true identity of the owners of Company C without the Commission invoking its inquisitorial powers under the Act. Without this evidence, the real substance of the transaction could not be determined. By not making these inquiries, the Commission and its Appeal Panel have failed to perform its statutory duty to determine that a bona fide sale of the subject residential complex took place in September 1981 as claimed.

After considering all of the evidence pertaining to the complainant's case and the representations made to me by the Commission, I have determined, pursuant to section 22(1)(b) of the Ombudsman Act, that the decision of the Appeal Panel of the Residential Tenancy Commission that the sale was bona fide, was unreasonable. Further, the decision of the Appeal Panel was unreasonable within the meaning of section 22(1)(b) of the Ombudsman Act in that it required the tenants to bring forth conclusive evidence on the bona fides of the sales transaction.

It is my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Panel of the Residential Tenancy Commission reconsider its decision and obtain further evidence from the landlord on the issue of the bona fides of the transaction between

Company A and Company B and in particular, the identity of the beneficial owners of Company C and Company A.

It is my further recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Ministry of Consumer and Commercial Relations develop and recommend appropriate legislative amendments to section 93(2)(a) of the Residential Tenancies Act to provide the Commission with a mandatory statutory duty to disregard the outward form of the transactions or the separate corporate existence of the participants, as opposed to its present discretionary power.

My final conclusions and recommendations were reported to the Ministry of Consumer and Commercial Relations and to the Residential Tenancy Commission on November 15, 1984.

On January 31, 1985, I received a response from the former Minister of Consumer and Commercial Relations, which in my opinion was appropriate in the circumstances of this case and the Minister was advised accordingly.

On January 31, 1985, I received a response from the Chairman of Residential Tenancy Commission, who advised that the Appeal Panel had reviewed their decision and stated that, in their opinion, no error was made and that the Appeal Panel had refused to exercise their discretion to rehear this appeal.

As I was of the opinion that the Commission had not taken adequate and appropriate action in this matter, I exercised my discretion pursuant to section 22 (4) and (5) of the Ombudsman Act and referred this matter to the Premier on March 18, 1985. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 5

The complaint against a decision of the Appeal Panel of the Residential Tenancy Commission was first registered with this Office by letter dated October 8, 1982. The complaint was that the Appeal Panel in its order dated October 1, 1982 unreasonably upheld the decision of a Commissioner (1) to allow for only two hours of labour per week by the landlord and family; (2) to reduce the claim for labour incurred in clearing the forest from the sum of $1,600 to $1,000; (3) to consider the architect's fees of $378 as a capital expenditure amortized over a 15-year period; and (4) to allow an interest rate of 15% on capital expenditures financed by the landlord's own funds.

On October 28, 1982, the Chairman of the Residential Tenancy Commission, was notified in accordance with the requirements of the Ombudsman Act, of the Ombudsman's intention to investigate the complaint as summarized above.

The Ombudsman asked the Chairman whether he was prepared to give a statement of his Commission's position regarding the complaint. We received a response from the Senior Legal Counsel for the Residential Tenancy Commission in a letter dated November 24, 1982. Our Office sent a copy of this statement to the complainant and she provided her comments in a letter dated December 10, 1982.

Subsequently, the complainant's file was assigned to a member of my legal staff for legal research and to a member of my investigative staff for investigation. During the course of the investigation, we obtained a copy of the Residential Tenancy Commission's file on the complainant's case and discussed the complaint with the Residential Tenancy Commissioner who originally heard this case, as well as with the Legal Counsel and Registrar of Appeals for the Commission. On March 7, 1983, my investigator interviewed the complainant's son and representative, as well as the complainant, over the telephone. The Residential Tenancies Act, the Residential Tenancy Commission Interpretation Guidelines, and the Commission's Guide to the Cost Revenue Statement were also examined.

Our investigation into the issue of Architect's Fee - Item #13 in Appendix B of the Appeal Order revealed that a draft plan covering the entire house was required in order for the landlord to obtain a building permit to perform work on the third floor apartment, i.e. installing the fire escape and sliding door. The complainant has pointed out that the plan has no future value since such draft work would need to be done again were she to apply for a new building permit, and she considers this fee to be for a service which cannot be properly considered as a capital expenditure but should have been allowed as an operating cost.

The Commissioner was asked about her decision on this issue. She pointed out that the complainant had initially classified this fee as a capital expense on the Cost Revenue Statement. The complainant responded that this was explained as a mistake. According to my investigator's conversation with the complainant's son, the architect's fee was originally claimed as a capital expenditure because of the relatively large amount involved. According to the Commission, because the plan was secured in connection with the third floor renovations (a capital expenditure), the "useful life" of the plan is tied to the life of the capital expenditure of the third floor work, and therefore its cost should be spread over the same time frame.

In the Guide to the Capital Cost Revenue Statement, the difference between capital expenditures and operating expenses is set out succinctly. This guide defines "operating costs" as:

> Those costs necessarily incurred in the operation of the complex on a day-to-day basis. Major expenditures, capital acquisitions, financing costs and any costs related to these are to be claimed in item 8 (i.e. Capital Expenditures) or item 9.

Obviously not all expenses fall neatly into one or the other category, but clearly it seems, "any costs related to" a Capital Expenditure, such as the third floor renovations, are to be classified with the expenditure according to this definition.

The Residential Tenancy Interpretation Guidelines set out the rationale for recovering such expenditures over a number of years when stating: "Certain expenditures will be of a nature whereby their benefit will be realized over a number of years and the expenditure itself will not be repeated in each year of operation of the residential complex." This type of expenditure, according to the guidelines, "should be recovered in the form of increased rents over a number of years rather than in total in one single year."

The results of our investigation into this matter were set forth in a letter to the complainant dated June 29, 1983 and her response was received in a letter dated July 8, 1983. Having considered the evidence presented in this matter, I am unable to conclude that the Appeal Panel's decision to uphold the Commissioner's decision to consider the architect's fees of $378 as a capital expenditure amortized over a 15-year period was unreasonable.

After conducting a careful review of all the material relating to the other issues of the complaint, I wrote to the Chairman of the Residential Tenancy Commission on May 3, 1984 and in accordance with section 19(3) of the Ombudsman Act invited him to make representations with respect to the following possible conclusion and recommendations:

Possible Conclusion

> The decision of the Appeal Panel of the Residential Tenancy Commission is unreasonable in that the landlord's claim for: (a) 15-20 hours per week of day-to-day landlord labour; (b) clearing the forest; (c) an interest rate of 18+% on capital expenditures; and (d) cementing a furnace room, were rejected. [Reference: Ombudsman Act, section 22(1)(b)].

Possible Recommendation

The Appeal Panel of the Residential Tenancy Commission should hear the landlord's claims for: (a) 15-20 hours per week of day-to-day landlord labour; (b) clearing the forest; (c) an interest rate of 18+% on capital expenditures; and (d) cementing a furnace room, pursuant to section 117(9) of the Residential Tenancies Act, and take appropriate steps to notify persons who may have an interest, including the present landlord and tenants of [the building]. [Reference: Ombudsman Act, section 22(3)(g)].

My possible conclusion and recommendation are based on the following information.

Until September of 1983, the complainant was the landlord of a large, 70-year old residence converted over the years into a three-unit family home, located on an extensive (one-third acre), well-planted lot. The property was acquired in March of 1973.

On September 30, 1981, the complainant applied to the Residential Tenancy Commission for a whole-building rent review pursuant to section 126 of the Residential Tenancies Act.

The landlord occupied Unit #1 of the building, with Units #2 and #3 being vacant at the time of the application for rent review. At the time of her application, the monthly rents for Units #2 and #3 were $528 and $333 per month respectively. The complainant was applying for an increase to $700 and $575 respectively, effective December 1, 1981.

A hearing was held on January 14, 1982 before the Commissioner, and on February 15, 1982, the Commissioner rendered her decision. She determined that the maximum basic rent chargeable for the rental units effective December 1, 1981 would be $539 and $443 respectively.

On February 26, 1982, the complainant's son filed a notice of appeal with the Residential Tenancy Commission on behalf of the complainant, stating a number of reasons why the Commissioner's order was "wrong". On March 5, 1982, the complainant's representative wrote to the complainant's MPP, providing him with detailed reasons why the complainant disagreed with the Commissioner's decision, and this letter was forwarded to the Residential Tenancy Commission and found on the Appeal Panel Commissioner's file.

The landlord's two representatives appeared before the Appeal Panel on August 24, 1982, and an increase in the maximum monthly rent chargeable on the two units to $582 and $478 respectively was ordered by the Appeal Panel on October 1, 1982.

1) Landlord Labour

With respect to the issue of landlord labour, that is the labour performed by the landlord and her family to keep up the house and property on a day-to-day basis, the complainant did not claim a flat figure for day-to-day landlord labour, but submitted claims under the following headings and in the following amounts:

	1980	1981
Cleaning and Janitorial	$532.00	$586.00
Snow removal	120.00	144.00
Grounds keeping	700.00	840.00
Garbage disposal	225.00	250.00
Damage expense capitalized (cleaning and repair)	417.00	690.00
	$1,994.00	$2,510.00

The Commissioner, in her written Reasons to the Order dated February 15, 1982, stated "I find that the above amounts to be excessive for the size of the building", and she decided to replace these claims with a blanket amount for day-to-day landlord labour. No further written explanation was provided whatsoever. The Commissioner allotted the landlord two hours per week at $10 per hour for a total of $1,040 for 1980 (plus $200 for cleaning and janitorial materials) totalling $1,240, with a 6% increase for 1981 totalling $1,312. This means that the Commissioner decreased the amount claimed by the landlord for day-to-day landlord labour by $754 for 1980 and by $1,198 for 1981.

The complainant found the Commissioner's allowance of only two hours per week in landlord labour to cut the lawn, maintain the grounds, clear snow and ice, take out the garbage and maintain a tidy interior, to be totally unrealistic, considering the size and nature of the house and property. In her February 26, 1982 Notice of Appeal, the landlord states: "an atrocious amount of landlord labour was slashed arbitrarily; section 12(i) must be rectified; figures were actually conservative; work about 15-20 hours/week not 2 hr/wk on average."

The Appeal Panel's decision states: "The landlord's representatives argued that the Commissioner had no right to reduce the amount claimed [under landlord labour] but they provided no evidence to the Panel to substantiate their position and hence the Commissioner's decision on this issue stands."

I note that the Appeal Panel had before it the Commissioner's written reasons, and the landlord's description of her claims.

The landlord gave the following recollection of the oral testimony heard by the Appeal Panel on this issue to our investigator:

> Since my house ... consists of three units the first Commissioner ... assumed this "to be excessive for the size of the building". However, as I explained to the Appeal Panel, my property is an original triplex (which I have been restoring) with eighteen rooms and huge ravine lot: sixty feet by 300 feet north side and by 190 feet south side. Landscaping alone requires more than two hours of work per week. For instance, my garden contains seven towering elm and maple trees, about ten smaller trees, about ten shrubs, a hedge, many big flower beds -- all of which need a great deal of raking or cultivation or pruning to keep in good order. Then, what about all the other work to which I have to tend? ....

As for documentary evidence, the complainant had submitted full written descriptions of her claims to the Residential Tenancy Commission prior to her hearing before the Commissioner. These written submissions were found in the Commission's Initial Record File, and, according to the Commission, the Chairman of the Appeal Panel would have had this file. The complainant's original submission included carefully itemized claims for her day-to-day landlord labour, and as an example, I will quote from her description of her 1981 "cleaning and janitorial" claim:

Clean-up after tenant left - 15 hours on second floor plus 10 hours on third floor at $6.00 per hour - (plus) 10 hours after chimney cleaned out plus flu	$210.00
Clean windows - 15 hours on basement, first, second, third floors at $6.00 per hour	$ 90.00
Vacuumed stairwell - one half hour per week at $5.00 per hour x 52 weeks	$130.00
Sweep sidewalk and porch - one half hour per week at $6.00 per hour x 52 weeks	$156.00
	$586.00

Other written submissions included the complainant's written Notice of Appeal pointing out the facts she intended to prove at the appeal hearing, and a letter written around the same time by the landlord to her MPP, setting out the details of why she disagreed with the Commissioner's decision; these were found on the Appeal Panel Commissioner's file. The landlord's letter in the Appeal Panel file points out that: "the Commissioner did not appreciate the amount of work

necessitated by a sizeable property", namely 1/3 of an acre, and provided examples to dispute the amount of time allowed by the Commissioner for landlord labour, such as this:

> The mowing of the lawn and the cultivation of the flower beds alone require about three hours of work per week in the summer months.

The complainant's evidence before the Appeal Panel clarified the type and amount of work involved in the upkeep of the property. Her representatives apparently made the point that the Commissioner's decision to drastically cut landlord labour was based on a faulty premise: an assumption that the house in question was a conventional triplex located on a standard lot.

It appears that despite the evidence before them, the Commissioner and the Appeal Panel did not recognize the size or nature of the property and the amount of work which its day-to-day upkeep necessitated.

(2) Clearing the Forest

This issue centres on the fact that a ravine in the rear of the complainant's property, which was neglected for between 25-40 years and left to grow wild, was cleared by the complainant and her family of tons of decayed fallen trees, vines, and refuse, including mattresses, broken glass, pop cans, etc. The Commissioner changed the item "clearing the forest" from an operating cost to a capital expenditure and reduced the claim from $1,600 (or 160 hours at $10 per hour) to $1,000. It should be noted that no reasons were offered by the Commissioner in her decision for making this reduction.

During my investigator's interview with the Commissioner, she asked the Commissioner why she had made such a drastic reduction. The Commissioner responded that she did not dispute the landlord's basic description of the type of effort or amount of time that went into clearing the forest, but stated that she found the cost claimed high considering the type of unspecialized work involved. She advised my investigator that she had arrived at the award of $1,000 by multiplying the number of hours claimed by the complainant x $6.00 per hour and "rounding it off", instead of granting the $10.00 per hour claimed by the complainant

The complainant points out that since the Commissioner herself settled on a rate of $10 per hour for day-to-day landlord labour in keeping up the interior and exterior of the residence as above noted, then such relatively heavy work as clearing the forest should be worth as much if not more per hour. When the Commissioner was questioned about

this item, she pointed out that the only documentary evidence that she had for it was the landlord's handwritten description which simply states that the forest was cleared, along with the number of hours and rate involved. Since no specialized labour or heavy equipment was involved, she lowered the landlord's claim.

The Appeal Panel stated that it saw "no need to disturb the Commissioner's findings on this matter", since the landlord had provided it with "no convincing evidence in that direction". However, the complainant advises that a vivid oral description of the clearing process was provided at the Appeal Panel hearing, very similar to the complainant's description of the forest-clearing process as written in her letter to her MPP found on the Appeal Panel Record File, which reads as follows:

> The 'Forest Clearing' (12. viii, p.4) was clearly shown to be labour - hours worked by the landlord. This work concerned clearing the 'ravine-type' lot of debris that the previous landlord had allowed to accumulate there. There was, in fact, a potential health hazard as mattresses, broken bottles, amongst other things, had been deposited there. Such a job belongs under maintenance, as it was through lack of maintenance by the previous landlord that the lot assumed the unkempt appearance. The shifting of this expense by the Commissioner reveals her rather biased and subjective assessment of the costs incurred by the landlord. On page 4, part (viii) the Commissioner merely states, "item 'Clear Forest in Backyard' will be considered a capital expense of $1000". No rationale is offered for her decision. More will be said about this below.

As stated above, the Commissioner failed to provide any reason for lowering the complainant's claim for clearing the forest. The Appeal Panel failed to address this omission, although the failure to provide any reason for a Commissioner's decision would seem to be contrary to section 117(4) of the Residential Tenancies Act, which reads as follows:

> Where a notice of appeal is filed under subsection (1), the Commissioner who made the order or decision being appealed shall, where he has not already done so, prepare reasons for the decision or order and give a copy of the reasons to each party to the appeal.

This omission made it difficult for the complainant to respond to the Commissioner's reduction of the claim for clearing the forest.

(3) Interest Rate

The third aspect of the complainant's concerns is with respect to the interest rate applied to capital expenditures. The Commissioner applied the "generally prevailing rate of return on investment" which she found to be 15%. The complainant contends that this rate is lower than the rate of return which she would have received on her investments had she not resorted to equity financing to complete the capital expenditures. When one of my investigators asked the Commissioner about her finding, the Commissioner responded that it would be unfair to consider a rate of 18+% over the life expectancy of the capital expenditure unless the money had indeed been borrowed and the landlord locked into the higher rate, particularly in light of the interest rate fluctuation and anticipated decline that prevailed in 1981. The Appeal Panel took the position that while the interest rate may, on occasion, exceed 15%, it found 15% to be a reasonable rate over the amortized life of the expenditure and confirmed the Commissioner's decision.

Our investigation has revealed that in cases of equity financing, the Commission's policy at the time was to apply the conventional first mortgage rate prevailing in the community. We have been advised by the Central Mortgage and Housing Corporation that the prevailing rate in November, 1981 was 18.8%. The Commissioner did not give any reason as to why the Commission's policy was not applied to the facts of the complainant's rent review application, nor did the Appeal Panel advert to the existence of this policy.

(4) Cementing a Furnace Room

Finally, a contention which came to light during our investigation concerns the complainant's claim for the cost of painting the furnace room under the heading "Painting and Decorating" on the Commission's cost revenue statement and the claim for the cost of cementing the same room to correct water leakage under the heading "Other Building Maintenance". Although there is clearly a difference between painting and cementing, the Commissioner used the claims under these two categories as an example of duplication and excluded the entire cost of cementing the foundation wall of the furnace room. Though the Commissioner advised my investigator that the issue was confusingly presented at the hearing, the complainant's cost revenue statement clearly makes this distinction.

The Appeal Panel decision and documentation on file do not address this particular issue since it was not specifically raised at the hearing. However, in her notice of appeal, the complainant disputed the Commissioner's findings in section 12(vi) of her order, which spoke to this particular issue. Moreover, the complainant's letter to her MPP in the Appeal Panel record file clearly indicated her dissatisfaction with the Commissioner's treatment of her claim.

In response to my section 19(3) letter to the Chairman, I received a written response from the Senior Legal Counsel dated August 3, 1984. In addition, on August 21, 1984 I met with the Chairman and the Senior Legal Counsel.

With respect to the interest rate allowable on capital expenditures, the Senior Legal Counsel emphasized that the Commission's Guidelines are guidelines only and they do not represent the Commission's policy, but merely the opinion of the Board of Commissioners on various subjects of interpretation and procedure. The approaches set out in the Guidelines are not binding on Commissioners, since to attempt to provide otherwise would amount to an improper fettering of their discretion.

In his letter dated August 3, 1984, the Senior Legal Counsel stated:

> The appeal panel's reasoning in affirming the Commissioner's decision with regard to this issue, adopting an approach different from that suggested in the Guideline, is clearly set out in paragraph 9 of the reasons for its decision. At the time the Guideline was issued by the Board of Commissioners, interest rates were relatively stable. However, at the times of these hearings, such was not the case, and the Commissioners, in exercising their discretion, chose to adopt what they saw as a more equitable approach. This is especially important in the case of capital expenditures, since these costs are permanently built into the rental structure.
>
> It is respectfully submitted that it was the appeal panel's decision that it would simply not be fair to the tenants to expect them to carry in their rents, such a high interest cost, when such costs could have (and indeed did) subsequently drop substantially.
>
> It is respectfully pointed out in regard that this Guideline was revised by the Board of Commissioners of the Residential Tenancy Commission, in November of 1982 to suggest that the interest rate that might be allowed, should be one that is "deemed to be a reasonable average rate that may be anticipated over the life of the capital improvement. It would appear that the Commissioner, in adopting the approach she did, in fact anticipated over the life of the capital improvement. It would appear that the Commissioner, in adopting the approach she did, in fact anticipated the position which would subsequently be suggested by the Board of Commissioners in this regard.

Having considered all of the information presented to me with respect to this issue, I am in agreement with the Senior Legal Counsel's

position that the guidelines are not binding upon the Commissioner and in the circumstances of this case, the Appeal Panel's decision to uphold the Commissioner's allowance of an interest rate of 15% on capital expenditures, rather than the complainant's requested rate of 18%, was not unreasonable.

With respect to the issue of the furnace room costs, the Senior Legal Counsel has stated that the Commissioner advised him that the evidence given at the hearing by or on behalf of the complainant was presented in a very confusing and unclear manner.

I note that the Appeal Panel's decision and documentation on file do not address the furnace room cementing issue. Appeals to the Panel are not hearings de novo and therefore place upon the appellant the onus to raise all issues in dispute and to introduce evidence to support his or her contentions. In her notice of appeal filed with the Appeal Panel, the complainant disputes the Commissioner's "sleight of hand" dismissal of landlord claim figures in "section 12(vi)" of the decision. Section 12(vi) included a dismissal of three claims, one of which (for the exterior painting of the house in 1980) was restored by the Appeal Panel; the issue of the interior cementing of the furnace room had also been dismissed under section 12(vi) and was therefore apparently also being appealed to the Appeal Panel.

The complainant's representative could not be clear as to what oral evidence was submitted at which hearing, but thought that likely a clarification of the landlord's earlier presentation to the Commissioner had been presented to the Appeal Panel. According to the Appeal Panel documentation, there is no evidence that the particular issue of the internal cementing of the furnace room was ever raised at the Appeal Panel hearing for its consideration and in my opinion, the Appeal Panel did not act unreasonably in failing to overturn the Commissioner's decision on this point.

With respect to the items, landlord labour and clearing the forest, I have considered both the Senior Legal Counsel's oral and written representations on these matters. In particular, I note the Senior Legal Counsel's statement in his letter dated August 3, 1984 that in his opinion, in the circumstances, it was entirely proper for the Commissioner to weigh the evidence against her own information and experience, derived from hearing and deciding numerous similar cases, as to what should be an appropriate allowance for "landlord labour" for a building of this size and type. However, the complainant provided specific examples of the type of labour which she and her family were required to carry out on a weekly basis, and estimated the same at 15 to 20 hours. In light of the fact that the Commissioner drastically reduced these hours to two hours per week, and pursuant to the Senior Legal Counsel's advice that this reduction in landlord labour was based upon

the Commissioner's own information and experience, I note that the Commissoner failed to share her personal information and experience with the complainant to enable the complainant to respond to the Commissioner's views on this matter and refute same, as contemplated by s.109 of the Residential Tenancies Act. The Commissioner's written reasons for so doing, as quoted above, provide no information to enable the complainant to fully argue her case before the Appeal Panel. In my opinion, the Appeal Panel had before it sufficient evidence to substantiate the complainant's claim of 15 to 20 hours per week, which would indicate that the Commissioner's decision to reduce this claim to two hours per week was unreasonable in the circumstances of this case.

With respect to the issue of clearing the forest, I note the Senior Legal Counsel's advice that the Commissioner reduced the hourly rate claim for the labour expended by the complainant and her family, based upon her own expertise. However, no sharing of this expertise was given to the complainant in order to enable her to respond to same. As well, the Commissioner failed to provide any written reasons why she reduced the hourly rate of $10 claimed by the complainant to $6 per hour.

The Appeal Panel noted the Commissioner had reduced this item from $1,600 to $1,000 and stated that "the landlord argued that his claim should have been allowed but provided us with no convincing evidence in that direction." In my opinion, in light of the Commissioner's having failed to provide any reasons for her reduction of the hourly rate claimed, and having noted the oral testimony which the complainant has advised that she presented before the Appeal Panel on this issue, the Appeal Panel's decision to uphold the Commissioner's decision on this matter was unreasonable in the circumstances.

I wish to further acknowledge my discussion with the Senior Legal Counsel, at our meeting on August 21, 1984, concerning the fact that one of the Appeal Panel members in this case has resigned. The Senior Legal Counsel advised that both he and the Ministry of the Attorney General have reviewed this matter and are in agreement that the remaining two members are not able in law to reconsider this case, were I to make such a recommendation in this matter. I confirm that I discussed with the Senior Legal Counsel the possibility of my recommending that the Residential Tenancy Act be amended to enable the remaining two Panel Members to reconsider a case, where the third Panel Member is no longer available in order that the present legal obstacle may be avoided in future cases. We also discussed the possibility that such recommendation be made retroactively to assist our complainant.

After considering all of the evidence pertaining to the complaint, I have determined, pursuant to section 22(1)(b) of the Ombudsman Act, that the decision of an Appeal Panel of the Residential Tenancy

Commission dated October 1, 1982 was unreasonable to affirm: (a) the decision of the Commissioner to reduce the landlord's claim for 15 to 20 hours per week as day-to-day landlord labour to two hours per week; and (b) the decision of the Commissioner to reduce the landlord's claim to clear the forest from a $10 hourly rate to a $6 hourly rate.

It is my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Ministry of Consumer and Commercial Relations develop and recommend appropriate legislative amendments to enable the remaining members or member of an Appeal Panel of the Residential Tenancy Commission to reconsider a prior decision rendered by the Appeal Panel in the absence of a full Appeal Panel, and that such legislation apply to previous decisions. Should such an amendment be made, I further recommend that the Appeal Panel reconsider its decision concerning landlord labour and forest clearing, pursuant to section 22(3)(g) of the Ombudsman Act.

My final conclusion and recommendations were reported to the Ministry of Consumer and Commercial Relations and to the Residential Tenancy Commission on November 21, 1984.

On February 4, 1985, I received a response from the former Minister of Consumer and Commercial Relations which in my opinion was appropriate in the circumstances of this case and the Minister was advised accordingly.

On January 31, 1985, I received a response from the Chairman of the Residential Tenancy Commission, who advised that his prior information to my Office that one of the original members of the Appeal Panel had resigned, so that the remaining members were not able in law to reconsider this case, was in error. In fact, all three original members of the Appeal Panel were still vested with their authority to rehear this matter. As a result, by letter dated February 6, 1985, I informed the Chairman that it was my recommendation that the Appeal Panel rehear this matter pursuant to the conclusion set forth in my report. However, on March 8, 1985, I received a response from the Chairman advising that the Appeal Panel had reviewed its decision and stated that in its opinion no error was made, and that the Appeal Panel had refused to exercise its discretion to rehear this appeal.

As I was of the opinion that the Commission had not taken adequate and appropriate action in this matter, I exercised my discretion and referred this matter to the Premier on March 18, 1985, pursuant to section 22(4) and (5) of the Ombudsman Act. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 6

The complainant attended at the Office of the Ombudsman on April 1, 1981 with a complaint relating to the Ministry of Health. The complainant advised that he had met that morning with Dr. C, then Senior Medical Advisor to the Deputy Minister of Health, who had advised him that the Ministry had not yet made a decision with regard to his complaint. By letter dated August 23, 1981, the complainant wrote to our Office, provided a copy of a letter from Dr. C on behalf of the Minister, dated May 5, 1981, and advised that he was dissatisfied with the position taken. After obtaining additional information from the complainant by telephone on September 1, 1981, my Office assumed jurisdiction on the matter.

On September 15, 1981, we wrote to the Deputy Minister, Ministry of Health, in accordance with the requirements of the Ombudsman Act. We notified him of our intention to investigate the complaint as follows:

> Pursuant to the Ontario Health Insurance Plan Schedule of Benefits, it is provided on page 63 under the heading:
>
> Notes and Interpretations
>
> 6. Claims for x-ray services when referred by an osteopath, chiropodist or chiropractor to a private x-ray facility are not benefits of OHIP.
>
> 7. Claims for x-ray services when referred by an osteopath or chiropractor to a hospital outpatient department are benefits.
>
> However the complainant who is a practising chiropractor in a [community in Ontario] is not allowed to order x-rays or receive reports from the Department of Radiology at the hospital. However in other small communities, chiropractors are allowed to refer their patients to hospitals for x-ray services and also to make similar referrals to [an Ontario university].
>
> The complainant contends that the Ministry is remiss in its failure to insist upon compliance with the provisions of the Schedule of Benefits by the hospital.

We also asked the Deputy Minister whether he was prepared to give a statement of his Ministry's position on the complaint. On October 22, 1981, our Office received a response from Mr. D, former Director,

Institutional Operations Branch, on behalf of the Deputy Minister. A copy of this response was forwarded to the complainant for his comments. The complainant's written representations were received on November 17, 1981.

The Ministry, in its response, referred to the fact that, pursuant to section 31 (now section 30) of Regulation 729 (now 865) under the Public Hospitals Act, no patient can be admitted to hospital except by a licensed physician. The relevant sub-section states:

> (1) No person shall be admitted to a hospital except,
>
> a) on the order of a medical practitioner who is a member of the medical staff of that hospital; and
>
> b) when the medical practitioner is of the opinion that it is medically necessary for the person to be admitted to the hospital as an in-patient.

It appeared therefore, that, in the Ministry's view, a chiropractor who wished to utilize x-ray facilities in a hospital must have his patient admitted by a licensed medical doctor with privileges. Thus, it seemed that the Ministry was taking the position that admission of the patient was required for the use of the x-ray facilities, notwithstanding the fact that the x-ray use would be in the out-patient department.

Our file on the matter was subsequently assigned for investigation to an investigator in the Directorate of General Investigations. During the course of the investigation interviews were conducted with the complainant and with the following representatives from the Ministry of Health: Mr. D; Dr. E, Chief, Profiles Analysis; Mr. F, former Executive Assistant to the Assistant Deputy Minister, Administration and Health Insurance; Mr. G, Assistant Deputy Minister, Administration and Health Insurance; Dr. H, Associate Deputy Minister, Institutional Health; Mr. J, Executive Assistant to the General Manager, Health Insurance Division; Dr. K, Chief, Medical Claims Policy, Professional Services Branch, Health Insurance Division; and Mr. L, Practitioner Claims Policy Advisor, Professional Services Branch, Health Insurance Division. In addition, a review was conducted of the hospital by-laws, the Public Hospitals Act and Regulations thereunder, and the Health Insurance Act and Regulations thereunder.

My investigation has disclosed the following facts.

An interview was held with Mr. D following our receipt of the 19(1) response. He advised my investigator that in his view there was no substantial difference between the terms in-patient and out-patient and that although Regulation 729 (now 865) might appear to be ambiguous, no

distinction would be drawn between the two categories in the draft amendments to the Regulation. Out-patients would merely be referred to as ambulatory in-patients.

Mr. D did agree however that there was an apparent contradiction between the effects of Regulation 452 of the Health Insurance Act and Regulation 729 (now 865) of the Public Hospitals Act concerning a chiropractor's access to x-ray services. He stated that he had to approach the issue from the perspective of a hospital administrator and therefore supported the position of the local Hospital Commission on this issue.

From a review of documentation provided by the complainant, specifically a letter dated April 23, 1980 from Mr. B, Chairman, Hospital Commission, it appeared that the position of the Commission was as follows:

> The Regulations under The Public Hospitals Act [do] not provide for a staff of chiropractors. It does allow the Board to provide Hospital By-laws for the appointment and functioning of Dental Staff but makes no provision for any other health personnel.

The Commission did permit chiropractors to view x-ray films with the patient's permission, but did not allow these practitioners to either order x-rays, or receive reports on them.

According to a December 4, 1979 letter to the complainant from the General Manager of OHIP, x-rays performed by a chiropractor in his office were insured benefits under OHIP to a maximum benefit per patient per year. On the other hand, x-rays performed by the out-patient department of a hospital on referral from a chiropractor were benefits without limitation. In the latter case, the radiology department submitted all claims to OHIP.

Pursuant to OHIP Bulletin No. 4178, issued on August 29, 1983, a definition is provided for "in-patient" and "out-patient" x-rays for billing purposes. According to Mr. J, although it was not stated, it was understood that chiropractors were part of the group of professionals who may refer out-patients to hospital radiology departments with the resulting bill being submitted by the hospital to OHIP.

At this stage of the investigation my investigator spoke with Dr. E and asked him about the Ministry's unofficial actions concerning chiropractors' referral of patients to hospitals' out-patient departments. Dr. E advised that he had received a number of telephone calls from representatives of individual hospitals' Medical Advisory Committees asking whether or not their respective hospitals should be accepting referrals from chiropractors. He advised them that he did not know of any reason why they should not. Dr. E

further stated that he believed this was the same position taken by the representatives of OHIP when so questioned by hospitals' representatives.

In order to determine whether this case involved a matter which could be resolved by the Ministry which seemed to be giving on one hand, while taking away with the other, my investigator contacted Mr. G after speaking with his then Executive Assistant, Mr. F. By letter dated September 22, 1982, the investigator, with the complainant's permission, provided Mr. G with a copy of the letter dated April 23, 1980, addressed to the complainant from Mr. B, with respect to the hospital's position on chiropractic referrals. We were advised that the letter would be referred to the attention of Dr. H to see whether the matter could be resolved.

Subsequently on December 14, 1982, we received a letter from Dr. H which stated in part:

> This is an internal policy matter which falls within the jurisdiction of the hospital board.

No further comments were provided by either Dr. H or Mr. G.

The Public Hospitals Act makes the Minister of Health ultimately responsible for all hospital by-laws. It would also appear to be his responsibility to ensure that consistent hospital practices are followed wherever possible. We noted that this responsibility is set out in section 9(1) of the Act which reads as follows:

> A hospital shall pass by-laws as prescribed by the regulations, subject to the approval of the Minister. [Emphasis added]

The investigation had shown thus far that officials of the Institutional Health Services Branch were of the view that, not only should chiropractors not be entitled to refer their patients to hospital out-patient departments for x-rays (Mr. D), but that the issue was a matter of internal hospital policy and not, by implication, a matter within the jurisdiction of the Ministry of Health (Dr. H). On the other hand, officials of the Health Insurance Division of the same Ministry were unofficially advising hospitals to accept such referrals. Further, OHIP provided total benefits for radiographic services only if the referrals were to hospital out-patient departments, rather than to private radiologists.

A review of the legislation revealed that the Public Hospitals Act makes a clear distinction between "patients" and "out-patients", and specifically states that an "out-patient" is not admitted as a "patient". Further, the Act does not make any statement to the effect that chiropractors cannot refer patients to out-patient departments for x-ray services.

The Regulations under the Health Insurance Act state that referrals of patients by chiropractors to out-patient departments for x-rays are benefits under OHIP.

It therefore appeared to have been the intent of the Health Insurance Act to allow for these referrals which do not provide any financial benefits to the chiropractors themselves. Rather, the benefits of OHIP coverage were intended for chiropractic patients throughout Ontario.

The position of the local Hospital Commission, as enunciated in the Hospital's By-laws, was that only its medical staff could diagnose, prescribe for, or treat out-patients in the hospital, effectively preventing the complainant from referring his patients for x-rays to the hospital's out-patient department.

It therefore appeared that an anomaly existed. Patients elsewhere had access to insured hospital out-patient x-ray services when referred by a chiropractor. Those resident in this locality did not.

At this stage of our investigation, it appeared open to the Temporary Ombudsman to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that the Minister of Health had acted unreasonably in his approval of the Hospital By-laws. This approval appeared to have the effect of denying insured out-patient radiology services to patients referred by chiropractors, and therefore appeared to create inequality of access to OHIP insured benefits.

It therefore appeared that it might be open to the Temporary Ombudsman to recommend, pursuant to section 22(3)(g) of the Ombudsman Act, that the Minister of Health should withdraw his approval of those provisions of the Hospital By-laws which had the effect of prohibiting chiropractors from referring their patients for x-rays to its out-patient department.

It also appeared open to the Temporary Ombudsman to recommend that, pursuant to section 22 (3)(g) of the Ombudsman Act, the Minister of Health should also review the by-laws and practices of all Ontario hospitals to ensure that similar anomalous situations do not exist with respect to chiropractic referrals.

By letters dated December 12, 1983, and directed to the Honourable Keith C. Norton, Q.C., Minister of Health, the Deputy Minister, Ministry of Health, and Mr. A, Executive Director of the hospital, these parties were afforded the opportunity to make representations respecting the possible conclusion and recommendations pursuant to section 19(3) of the Ombudsman Act.

On February 2, 1984, we received the representations from the Hospital through its counsel. Both written and oral representations were received from the Ministry of Health. These representations were summarized in a letter, received by our Office on February 15, 1984, from the Honourable Keith Norton on behalf of himself and the Deputy Minister.

It was the position of the hospital that, given the existing legislation (Public Hospitals Act and Regulation 865), it would be unlawful for the hospital to amend its by-laws as tentatively recommended by the Ombudsman. It suggested that there was a legislative gap and that the hospital by-laws were in accordance with the current legislation.

In essence it was the position of the Minister that he cannot usurp the power of a Hospital Board by demanding conformity with a non-existent regulatory prescription, and that Hospital Boards do not fall within the Ombudsman's jurisdiction.

Prior to our reconsidering this complaint, my investigator contacted Dr. K and Mr. L of the Health Insurance Division of the Ministry.

Dr. K advised my investigator that he was not aware of the legal position taken by those hospitals that did not accept chiropractic referrals. He stated that in his conversations with hospital representatives, he has endeavoured to point out that it would be in the best interests of the patient for x-rays to be performed in the hospital out-patient radiology department. I understand that Dr. K's reasoning for this viewpoint is based in part on the recent advances in technology which have rendered the more modern x-ray machines safer for patients. Better screens in the newer machines direct rays at the area being photographed, rather than at the patient's entire body. On the assumption that hospitals replace their machines on a more frequent basis than do private practitioners, it would seem logical to assume that hospital-based equipment is safer.

In addition, x-rays taken in hospital settings are done under the authority of the Director of Radiology. Accordingly, a radiologist reads the film and provides a written report. I understand from Mr. L that approximately one-third of all chiropractors in Ontario do not own x-ray equipment. It is therefore necessary for them to either use a hospital's radiology services, or the services of a private radiologist. I note that pursuant to the Schedule of Benefits, referrals by chiropractors to private radiologists are not a benefit of OHIP. This therefore creates an additional expenditure for the patient.

Mr. L is the Ministry representative involved in the preparation of a position paper for the Healing Arts and Radiation Protection Committee (HARP). Draft submissions by HARP have been presented to the

Ministry. It is my understanding that the position paper being prepared by Mr. L will include a recommendation that an attempt be made to centralize all x-rays by both medical and non-medical practitioners in hospital radiology departments.

Following receipt of the statements of counsel for the Hospital and the Ministry, and our further investigation, I reviewed the position taken by my Office as expressed in the Temporary Ombudsman's letter of December 12, 1983.

Reconsideration of the Public Hospitals Act and Regulation 865 thereunder, in light of the arguments put forth by the hospital's counsel, led me to conclude that there was in fact a legislative gap which would preclude the Minister of Health from resolving the existing problem as tentatively recommended in our December 12 letter.

Accordingly, consideration was given to other possible means by which a solution to the problems inherent in the complainant's inability to refer his patients to the out-patient department of the Hospital could be identified.

I am of the view that the Minister has a duty to exercise his responsibilities in a consistent manner. If he feels strongly that the use of hospital facilities by chiropractors is of such benefit to the people of Ontario that special provisions under the Health Insurance Plan are made, appropriate revisions of Regulation 865 under the Public Hospitals Act might also be necessary to ensure that benefits are available uniformly throughout the province.

Having considered all the facts of this case, I have come to the following conclusion and recommendation.

Conclusion

I have concluded, pursuant to section 22(1)(b) of the Ombudsman Act, that the Ministry of Health's reply to the complainant's request for assistance unreasonably omitted to respond to his concern about the refusal of the local Hospital Board to allow him to refer his patients for x-rays to its out-patient department. This response was unreasonable because it condones the existence of an anomalous situation where, on the one hand Schedule 15 of Regulation 452 under the Health Insurance Act specifies that when a chiropractor refers patients to hospital out-patient x-ray departments the resulting claim is an OHIP benefit, but on the other, Regulations under the Public Hospitals Act prevent public hospitals from legally accepting such referrals.

Recommendation

It is my recommendation, pursuant to section 22(3)(e) of the Ombudsman Act, that the Minister of Health seek the appropriate amendments to Regulation 865 under the Public Hospitals Act to require public hospitals to accept referrals from chiropractors and osteopaths for radiology services in hospital out-patient departments. This would ensure that the OHIP benefits specified in Schedule 15 of Regulation 452 are equally available to all chiropractic and osteopathic patients throughout the province.

By letter dated September 21, 1984, the Deputy Minister of the Ministry of Health acknowledged receipt of the Ombudsman's Report. Follow-up letters were received from the Assistant Deputy Minister of Health, Administration and Health Insurance, dated November 23, 1984, and February 20 and March 25, 1985. We were advised that discussions were taking place with the Ontario Chiropractic Association, that a survey was being developed with the Association to obtain a better appreciation of utilization patterns, and finally that it was still the Ministry's view that hospitals had the right to provide x-ray services to chiropractors, the final decision resting with each Hospital Board. As the matter had not been resolved by March 29, 1985, my report was forwarded to the Premier.

DETAILED SUMMARY NO. 7

The complainant contacted this Office on April 7, 1983 with a complaint against the Ontario Health Insurance Plan (OHIP). On April 26, 1983, the Ombudsman notified the General Manager of OHIP, of the following complaint.

The complainant's daughter was a psychiatric patient at a U.S. hospital. On January 27, 1982, the complainant was advised by OHIP that due to an amendment to the Regulations of the Health Insurance Act, effective August 21, 1982, OHIP would no longer cover 75% of the costs of providing care for her daughter and, that an additional charge of $16 per day would be assessed. Under the new regulation, OHIP considered her daughter's accommodation to be at the semi-private rather than standard ward level.

The complainant was also assessed a retroactive charge for the period August 21 to October 31, 1982.

The complainant contended that OHIP's position was unreasonable as her daughter's accommodation was not semi-private, but standard ward accommodation.

She also complained that OHIP's actions denied an insured Ontario resident entitlement to the full percentage (i.e. 75%) of standard rate payment and by so doing has made the cost of insured services a crushing financial burden on the family.

She wanted OHIP to drop the charges for a semi-private room so that her daughter may continue receiving the medically necessary treatment which is not available in Ontario and that OHIP reimburse her for the extra assessment retroactive to August 21, 1982.

By letter dated June 1, 1983, OHIP responded. It re-affirmed the correctness of its position, noting that the complainant's daughter's monthly accounts for the U.S. hospital were stamped "semi-private".

The daughter was diagnosed by doctors both in Ontario and in the United States as a schizophrenic in need of long-term intensive psychotherapy in a hospital-like setting. That diagnosis was initially made in 1977. It continues to be valid today and has never been disputed.

The type of care and treatment which she required was not available in Ontario. In April, 1977, the General Manager of OHIP, in accordance with the Health Insurance Act regulations then in effect, approved the complainant's daughter's hospitalization in the U.S. hospital, and has continued to so approve. She recently returned to Ontario on September 17, 1984 because her family could no longer afford the surcharges imposed by OHIP. She is currently receiving treatment in an Ontario psychiatric hospital.

OHIP was alerted to her so-called semi-private accommodation when the words "semi-private" were stamped on the bills by the U.S. hospital. The bills were submitted to OHIP for payment.

The complainant considered this an error and attempted to clarify the nature of her daughter's accommodation so OHIP would stop levying the semi-private surcharge. Officials at the U.S. hospital wrote to OHIP on December 2, 1983, but without success. The U.S. hospital stated the bill was stamped "semi-private" by its accounting department to satisfy the demands of American insurance companies. The hospital, itself, does not consider the accommodation as being semi-private as distinguished from standard ward. The U.S. hospital only has one kind of accommodation available. Dr. A, Medical Director at the U.S. hospital, stated in his December 2, 1983 letter as follows:

> "It is a thirteen bed ward accommodation.... All of the rooms on the ward open onto a hall where the bathrooms, nursing station, day rooms, and living room areas are located. Group bathrooms are used by five to seven patients. Room charges for all patients are the same.... all of our patients are admitted

> to a 'ward', which is the only accommodation the Hospital provides - there is no choice." [Emphasis added]

In a "Certificate" dated April 21, 1983, the U.S. hospital stated that:

> "[T]he type of accommodation available to [the complainant's daughter] and which she had and will continue to use here, is the only type of accommodation available to her and is the standard accommodation available to all patients and in use for all patients of [the U.S. hospital]. I further certify that this accommodation has been specifically designed for the optimum care and treatment of psychiatric patients and that for the optimum care and treatment of the complainant's daughter it is necessary that she be supplied with this type of accommodation. This type of accommodation is standard ward accommodation at [the U.S. hospital] and is not described as, nor known as semi-private accommodation, whatever the description of such accommodation might be outside [this State]." [Emphasis added]

The complainant's daughter shared her room with another patient. She did not request semi-private accommodation, nor was any other type of accommodation available. Her personal area was actually somewhat smaller then she would have had in a standard ward in an Ontario hospital. There was no bathroom in her room or any other amenity normally found in "semi-private" hospital rooms in Ontario. She shared the bathrooms in the corridor with twelve or fourteen other patients.

In order to determine the merits of the position taken by OHIP that her accommodation at the U.S. hospital is semi-private, the standard should be what is normally applied in psychiatric hospitals in Ontario.

Generally, in Ontario semi-private accommodation is regarded as a two-bed room but with certain amenities such as telephone, shower, or bath in the room.

In the psychiatric hospitals operated by the Ministry of Health, a patient cannot demand a semi-private room as of right. Accommodation is assigned for medical or security reasons. If, on the basis of these criteria, hospital staff assign a patient to a two-bed room, the patient is not charged a surcharge.

At the Clarke Institute of Psychiatry, patients can request semi-private or private accommodation and would be charged a surcharge. If, however, a patient is placed in a semi-private room by the hospital staff for either medical or security reasons or on the basis of bed availability, the patient is not charged a surcharge. A similar policy

pertains in the psychiatric wards of three public hospitals in the City of Toronto, irrespective of the number of beds in the room.

Applying the criteria employed in Ontario psychiatric hospitals, the daughter's accommodation would not be considered "semi-private" on the physical layout of the room alone. Even if she were assigned to what is in fact a semi-private room in Ontario, she would not be charged the semi-private surcharge because it would be for medical and security reasons.

Having found on the evidence that the complainant's daughter's room at the U.S. hospital is not semi-private, either by the U.S. hospital's standard or by Ontario psychiatric facility standards, we then considered the merits of the semi-private surcharge levied by OHIP.

To be clear, there are two different charges involved. First, there is a semi-private surcharge to the complainant. This is charged by OHIP because the regulation does not permit OHIP to pay for semi-private accommodation in a psychiatric hospital. This amount is currently $22.50. The second charge is applied to the balance of the hospital bill (after the semi-private reduction). The regulation only allows OHIP to pay 75% of the psychiatric hospital's ward rate.

The Ministry's psychiatric hospitals assign patients to accommodation for medical or security reasons and even where patients are placed in two-bed rooms no extra charge is imposed. This is consistent with section 52(2), Health Insurance Act which determines medical and other entitlements of insured persons admitted to psychiatric facilities so designated under the Mental Health Act and Mental Hospitals Act:

> s.52(2) An insured person who is entitled to insured services under this Act and the regulation and who is admitted to a hospital under this section is entitled to such services as are required for his maintenance, care, diagnosis and treatment in accordance with this Act and the regulations without being required to pay or have paid on his behalf any additional premium or other charge beyond that necessary to entitle him to insured services under the Plan. [Emphasis added]

The complainant's daughter is an insured person. If the U.S. hospital were in Ontario and designated under either the Mental Health Act or Mental Hospitals Act she would not be charged the surcharge even if her accommodation was a semi-private room. In fact, OHIP would pay the entire cost of her treatment without making the 25% deduction made on the the U.S. hospital accounts. Section 52(2) does not apply to the complainant's daughter because this hospital is an American hospital.

Subsection 40(3) of Regulation 452 also addresses this issue:

> s.40(3) Where the attending physician certifies in writing that an insured person's condition is such that he requires immediate admission as an in-patient and standard ward accommodation in an approved hospital is not available because all such accommodation is occupied or where the attending physician certifies in writing that an insured person's condition is such that for his own good or for the good of other patients it is necessary that he be supplied with private or semi-private accommodation he shall be provided by the hospital with private or semi-private accommodation without paying any charge to the hospital for such services. [Emphasis added]

The psychiatric wards in three public hospitals in the City of Toronto have a policy which complies with subsection 40(3); that is, where a patient is assigned to a room by hospital staff for medical or security reasons or on the basis of bed availability, no additional charge is imposed. Subsection 40(3) would apply to patients suffering physical illness as well as mental illness.

In terms of the 25% deduction from her hospitalization costs, the Health Insurance Act regulations and policies discriminate between patients requiring hospitalization for physical illness and patients requiring hospitalization for mental illness where the hospitalization occurs outside of Canada. Section 57(2) of Reg. 452 states:

> 57(2) Where a person receives treatment in a hospital outside Canada as an in-patient or out-patient, the cost of the insured services paid by the Plan shall be the amount determined by the General Manager [of OHIP] for that hospital.

The General Manager's policy is outlined in the OHIP publication Ontario Health Insurance Plan General Guide, Page 25:

> (a) Hospital benefits:
>
> When an insured person receives treatment in a hospital acceptable to the Plan, the full hospital charges for the insured in-patient or out-patient services are payable when the necessary treatment is the result of an emergency, or evidence is provided and confirmed by OHIP that treatment is not available in Ontario. [Emphasis added].

Thus, hospital charges for necessary (non-elective) treatment for physical illness are compensated at 100% when such treatment is not available in Ontario.

Section 58(1)(b) states that:

58(1) Treatment for,

....

(b) Mental illness where the General Manager is of the opinion that suitable facilities are not available in Ontario, rendered by a hospital outside Canada is prescribed as an insured service under the Plan.

Section 58(2) of Regulation 452 as amended provides that:

58(2) The amount payable by the Plan for the insured service described in subsection (1) is, where the accommodation is at the,

(a) standard or public ward level, 75% of the cost thereof; or

(b) private or semi-private level, where there is,

(i) a charge for such accommodation, 75% of the amount arrived at by subtracting the charge, or

(ii) no charge for such accommodation, 75% of the amount arrived at by subtracting the average charge for such accommodation in Ontario,

from the cost of the insured services described in subsection (1) .... [Emphasis added]

Although accommodation for necessary treatment for physical illness, where such treatment is unavailable in Ontario, is compensated at a rate of 100%, accommodation for necessary treatment for mental illness, where the treatment is unavailable in Ontario, is compensated at only 75%.

Thus, the Regulation authorizes a difference in rates of reimbursement which discriminates against patients like the complainant's daughter for no apparent reason. Moreover, both the reduced rate of reimbursement and the per diem deduction for semi-private accommodation as prescribed by Regulation 452 are inconsistent with the spirit of Section 52 of the Health Insurance Act which governs the reimbursement for the necessary treatment of mental illness in Ontario. OHIP has provided no explanation for this distinction between out-of-province treatment for mental and physical illness.

On June 28, 1984 my Executive Director, the then Acting Ombudsman, forwarded several possible recommendations and conclusions to the General Manager pursuant to section 19(3) of the Ombudsman Act.

OHIP was advised that it could be adversely affected by these possible recommendations and conclusions and was invited to make representations to me.

OHIP initially indicated it would make representations and was granted six months to do so. No recommendations were ever received either to the tentative or final report. We therefore issued our report.

The complainant was aware of OHIP's practice to reimburse only 75% of standard ward accommodation for out-of-province treatment for mental illness prior to her decision to send her daughter to the U.S. hospital. This practice was in accordance with existing legislation. The practice was applied equally to all individuals in the complainant's daughter's situation. Although we were of the view that this practice was in accordance with the provisions of a Regulation that are unjust and improperly discriminatory, we were not prepared to recommend that the complainant be reimbursed for both the 25% deduction and the semi-private surcharge, but only the semi-private surcharge.

In summary then, the following conclusions and recommendations have been reached as a result of our investigation:

1. The action of the General Manager of OHIP in classifying the complainant's daughter's accommodation at the U.S. hospital as semi-private is unreasonable pursuant to subsection 22(1)(b) of the Ombudsman Act.

2. The action of the General Manager in classifying the complainant's daughter's accommodation as semi-private was in accordance with the provision of the regulations made pursuant to the Health Insurance Act, namely subsection 58(2)(b)(ii) of Regulation 452 as amended by Regulation 527/82, R.O. 1982, that is unjust and improperly discriminatory, pursuant to subsection 22(1)(b) of the Ombudsman Act.

3. The action of the General Manager in not reimbursing the complainant 100% of her daughter's hospital bill was in accordance with the provisions of the regulations made pursuant to the Health Insurance Act, namely subsection 58(2) of Regulation 452, R.R.O. 1980 that are unjust and improperly discriminatory.

Based on the above conclusions, we made the following recommendations:

1. The action of the General Manager of OHIP in classifying the complainant's daughter's accommodation as semi-private should be cancelled and her accommodation reclassified as standard ward, pursuant to subsections 23(3)(c) and (g) of the Ombudsman Act.

2. The complainant should receive reimbursement of the total semi-private surcharge levied by the Ontario Health Insurance Plan during the complainant's daughter's stay at the U.S. hospital.

3. The Minister of Health should seek an amendment to section 58(2) of Regulation 452 (as amended) under the Health Insurance Act to bring it into line with section 57(2) of the same Regulation, thereby removing the existing discriminatory gap between mental and physical illness.

Our final conclusions and recommendations were reported to the Ministry on March 6, 1985.

Not having received a response to this report, it was our opinion that a reasonable time had passed and that the Ministry had not taken appropriate or adequate action in this complaint. On March 27, 1985, pursuant to section 22(4) and (5) of the Ombudsman Act, the Premier was informed of the results of our investigation. The complainant, the Minister of Health, the Deputy Minister of Health and the General Manager of OHIP were also notified of the results of the investigation.

DETAILED SUMMARY NO. 8

In a letter received at our Office on January 27, 1983, the complainants complained that the recent construction of a highway beside their 10-acre lot had reduced the value of their property. They suggested that the Ministry of Transportation and Communications (MTC) should provide them with compensation so as to enable them to relocate in an area similar in value to their current home prior to the construction of the highway, and to compensate them for the emotional and physical stress they had suffered during construction and the use of the highway, and to compensate them for professional cleaning that had to be done during the construction program.

On March 7, 1983, the Deputy Minister of Transportation and Communications, was informed of this Office's intention to investigate the complaint. The Deputy Minister was asked to comment, and his response was received on March 23, 1983. Shortly thereafter, an investigation was commenced.

During this investigation, information was obtained in personal interviews with the complainants; Mr. A, Environmental Planner; Mr. B, Environmental Planner; Mr. C, Senior Environmental Planner, Environmental Unit, Planning and Design Section, MTC; and the Executive Assistant to the Deputy Minister.

In addition, the Ministry completed, at our request, an analysis of the traffic noise at the complainants' property. The results of this study, as well as photographs and documentation relating to the construction of the highway and the relevant provisions of the Expropriations Act, were reviewed.

During the investigation the complainants were kept informed of all the material information which was contrary to their interests. Their comments have been noted and I have taken them into account, prior to reaching my conclusion and recommendation.

My Office's investigation revealed the following information.

The complainant is a chartered accountant practising in Ontario. In 1963, the complainants purchased 10 acres of land for $4,500. Their lot is located approximately one-half mile west of a highway. It is approximately three miles from a town of approximately 5,000, and ten miles from City D.

The complainants' lot is the third 10-acre lot west of the highway. When the lot was purchased, there were no other homes built on the other lots and the area was exclusively agricultural. The complainants state that the rural character of the area initially attracted them to it. In 1965, they constructed a house and a well at a total cost of $22,250. Additions were built in 1974 and 1977 which involved the construction of a garage, a family room, a storage room and remodelling of the kitchen. The complainants have estimated that these additions cost $30,000 to $35,000. In 1974 and 1978, the complainants' children were born; they are now nine and five years old.

In the early 1960s, the Ministry of Transportation and Communications and the City D began planning the construction of the highway. Ministry officials were of the opinion that an efficient, direct transportation route involving a four-lane divided highway was required to connect City E with the freeway. Initially, the Ministry planned to construct the highway due east from City E to the north of City D where it would curve gently southward until it intersected with the freeway.

However, the Ministry later changed its plans and decided to construct the highway in a due easterly direction from City E to Town F,

where it would curve to the south and west of City D until it intersected with the freeway southeast of the complainants' property.

The reconsidered route to the southwest of City D was announced to the public in 1973. Information concerning various alternative routes, cost of construction, traffic flows, environmental impact and agricultural land use was supplied by the MTC and was considered at public meetings in Town F and two other affected communities in April and June, 1973.

The complainants claim that prior to construction, at public meetings held by the MTC, the local residents were told by MTC officials that berms would be constructed to reduce noise and the highway would be built below the present land level to reduce visual and noise impact.

The complainants were very concerned about the rerouting of the highway because their property was situated in the target area. On September 30, 1973, they wrote to the Minister of Transportation and Communications voicing their concern over the new route. Despite their objections and those of other affected residents, the southwesterly route was chosen, which placed the highway within 150 feet of the complainants' property and 300 feet of their house.

In the summer of 1978, construction of the highway between the freeway and Town F was commenced. None of the complainants' property was required for construction.

The complainants felt that they were inconvenienced to a great extent during construction of the highway, which lasted each summer from 1978 to 1981. The complainants were subjected to dust and noise and they complained to the Ministry that no precautions were taken to control these irritants. The complainants resorted to closing all their windows and doors during construction. They sent a cleaning bill of $112 to the Ministry for the cleaning of windows and interior surfaces. The Ministry refused to pay, taking the position that any damages suffered due to construction were the responsibility of the construction company. In addition, the complainant claimed that gravel trucks raced by their property on the concession road at 70 miles per hour, creating much dust, noise and danger.

Construction was completed and the highway was opened for traffic in November of 1981. In January, 1983, the complainants contacted our Office and generally expressed their complaints concerning the inconvenience they had suffered during construction and the difficulties experienced after the highway was opened to traffic. Specifically, the complainants stated the following:

1. Although the Ministry had promised berms and the lowering of the highway level to reduce traffic noise, berms were not built and the level of the highway was not lowered. Consequently, they are bothered by the noise from the highway.

2. The peace, quiet and general rural character of the property had been destroyed by the proximity of the busy highway. They complained of the sight of dirty trucks with garish advertising, the smell of exhaust fumes, danger from accidents on the road involving tankers, motorists stopping to relieve themselves, weeds growing on MTC property, and their children being cut off from their friends on the other side of the highway.

3. Traffic on the highway is continuous and includes large transport trucks. The vibration from the traffic has often shaken the house, and since the highway has been opened, cracks have appeared in the walls and foundations, which they attribute to vibration from the highway.

4. The proximity of the highway has resulted in several unpleasant experiences. Strange motorists have knocked on their door to request to use the telephone; a car caught fire on the highway outside their home; and a truck blew a tire outside their home, creating a frightening explosion.

5. The value of their home has been reduced by the presence of the highway.

In their correspondence, the complainants stated that due to the great reduction in their enjoyment of their home, they wished to relocate in an area similar to theirs before the construction of the highway. However, since their property value has been reduced, they would require compensation in order to purchase such a property, and they requested the Ombudsman's assistance in obtaining such compensation.

The Ministry's response to my Office's letter of intent to investigate did not address the issue of compensation. Instead, the Ministry stated that no commitment was given by the Ministry to construct the highway at a depressed grade or that berms would be provided. Rather, the Ministry committed itself to considering such, along with other engineering and construction considerations. This response essentially confirmed the earlier position taken by the Minister of Transportation and Communications in his letter of August 23, 1982 to the complainants. In that letter, the Minister stated:

1. At the planning stage of this project, as is customary with most highway planning studies, a number of options

were discussed for consideration in the subsequent design phase. At that early stage, it would not yet be known which particular features could be incorporated into the final design; among these, the possibility of a berm to screen the highway from adjacent properties was undoubtedly discussed. However, in avoiding any taking of property from you and your neighbours, and retaining the existing concession road, we were left with insufficient property to develop a berm of the dimensions required to provide an effective barrier.

In any case, the conditions in this vicinity, in terms of the number of homes affected and the actual noise levels, do not warrant the provision of noise barriers.

2. The grade of the highway also is finalized during detailed design and results from an attempt to balance earth quantities as closely as possible. Because of the various elevation controls, the grade in your vicinity could not be significantly depressed below the existing ground level. A very deep cut would be necessary to achieve a real reduction in noise levels adjacent to the highway.

While I acknowledge that the highway does represent a visual intrusion and does increase noise to some extent, there is nothing we can reasonably do that would afford a significant benefit.

The Deputy Minister, however, stated that he would be willing to have his staff undertake an on-site evaluation of the noise problem in order to assess the severity and develop and evaluate alternative solutions. Such a study was completed at our request and the results were received at our Office in October, 1983.

The purpose of the study was to determine the existing and projected noise levels due to highway traffic at four residential sites along the south side of the highway, including the complainants' property. Noise levels were collected by three methods: actual sound level measurements in the field; a simulated computerized highway traffic noise prediction model; and a manual prediction method, essentially a formula into which are plugged various values.

According to the study's authors, actual sound level measurements are sometimes taken in order to confirm calculated levels in cases where unusual site conditions would be difficult to simulate by the computer model or there is a lack of public confidence in the analysis. However, the authors state that actual sound measurements fail to measure the overall average conditions and they are subject to extraneous noises

such as lawnmowers or temporarily high or low traffic flows. Thus, the authors calculated the average noise levels by three different methods in order to obtain more complete information. The study's summary and conclusions are set out as follows:

> The nomograph calculation carried out by M.T.C. indicated a 1982 noise level of 53.3 dBA at the complainants' residence. Ambient noise measurements taken at the subject sites verified the nomograph calculation with an average noise level of 54.6 dBA over 24 hours. Sound levels predicted by computer analysis are slightly higher, averaging 57.0 dBA for the sites in question using 1982 traffic volumes.
>
> It is apparent from the noise predictions and measurements that the construction of the highway has resulted in an increase in noise levels at the subject sites of approximately 10 dBA. M.T.C. noise policy states that:
>
> > "Where a new freeway or freeway expansion through an existing residential area will generate a noise level between 55 and 65 dBA upon completion and where the freeway will increase the pre-existing noise levels by 5 dBA or more, then the resultant noise level should be attenuated where feasible".
>
> Planning and design of the subject portion of the highway preceded the development of the above policy. The possibility of developing a berm to screen the highway from adjacent properties was undoubtedly discussed. However, considering the number of homes affected, the relatively low noise levels and the property limitations preventing construction of a very effective noise berm, such a development was judged not feasible. Depression of the highway in a cut deep enough to achieve significant noise reductions was similarly deemed not feasible during the detailed design stage due to various elevation controls including a relatively high water table in this area. Furthermore, any earth produced by excavation to lower the highway grade would have been unsuitable for use elsewhere on the project.
>
> Since attenuation was not considered feasible at the planning and design stages, the site in question can now be considered only on a retrofit basis.
>
> M.T.C. retrofit policy for existing freeways states that:
>
> > "Noise barriers should achieve an average total attenuation no less that 5 dBA for sites having noise levels below 70 dBA...."

As indicated in Table 2 (page 11), the computer analysis for this area indicates that an attenuation of scarcely 5 dBA could be achieved by construction of a noise barrier.

M.T.C. policy for Retrofit of Existing Freeways further states that:

> "Selection of candidate sites for retrofit shall be based primarily on prioritization of all potential sites. The prioritization shall be a cost benefit analysis which accounts for the cost of the noise control measures in dollars, the number of residences, the summation of the number of dBA the existing noise level exceeds 55 dBA at each residence and the predicted attenuation for each."

Property and drainage constraints prohibit the development of an effective earth berm to protect the subject properties. A noise barrier of sufficient length to provide the predicted attenuation would cost in excess of $300,000 in addition to necessary drainage alterations and other earthworks. Such a barrier would benefit only four residences, where future (1990) noise levels scarcely reach 60 dBA, and the attenuation provided by a barrier would average only 4.8 dBA. Furthermore, the barrier would have to be constructed between the freeway and the existing gravel service road, thereby offering no protection from noise generated by the traffic on the gravel road. Considering the fact that "an increase or decrease of 3-5 dBA is normally regarded as just perceivable to a receiver" it is not possible to justify the construction of a barrier at this location.

Having examined this site in relation to the 60+ sites already included on the province-wide retrofit priority program listing, it appears unlikely that this site will be competitive for provision of a noise barrier for the foreseeable future.

The study was forwarded to the complainants, who were still of the opinion that they should be compensated for the decrease in the value of their property. In May, 1982, the complainants listed their property for sale for $135,000. Their listing agent was originally of the opinion that the property was worth $135,000. However, all of the prospective purchasers have objected to the proximity of the highway. It is currently listed at $120,000. Since the house has been listed, approximately 10 buyers have looked at it, but none have made an offer. Since each time a buyer comes to the home the complainant must prepare it for viewing, she now tells any agent who calls that the home is beside the highway. She does this because on occasion she has spent a great deal of time and

effort preparing the house for viewing, but the prospective buyer becomes uninterested in the home once he learns of the location of the highway.

Until the highway was built, the complainants never considered leaving their home. It had a quiet rural character and was close to a community which they both enjoyed. The complainant grew up on a farm and dislikes the noise of the city. She states that when the doors and windows are closed and the traffic is light, the noise from the highway is barely audible. However, in the summer, when the windows and doors are open, the noise is deafening, especially when the traffic is heavy. The traffic is heavy from 2:00 to 7:00 p.m. and from 11:00 p.m. throughout the night.

The complainant stated that throughout the night trucks can often be heard approaching when they are a few miles away. The noise gets louder and louder until the truck passes. She likens the effect to that of a dripping tap. It focuses her attention to the point where she cannot sleep. She now takes sleeping pills each evening but they only keep her sleeping until approximately 4:00 a.m.

The complainant stated that he believes fair compensation for the devaluation of his property due to the construction of the highway would be $25,000. That figure is based on the fact that if he sold his property now for approximately $100,000, he would have to add at least $25,000 in order to purchase a property comparable to his present one.

The Expropriations Act would have entitled the complainant to file a claim for injurious affection because of damage caused by the construction of the highway. However, the Act imposes a limitation period of one year from the date that the damage was sustained. Since the construction and the loss of value occurred in 1981, it would appear that the limitation period for bringing an action under the Act has expired. The complainant stated that he did not initiate such an action because he did not realize that there was a time limit, and therefore was not aware that the possibility of such an action would eventually be foreclosed. He felt that he would attempt to obtain assistance from the Office of the Ombudsman, and if that was not successful, he would consider initiating a private action.

According to the complainants they were also discouraged from taking legal action under the Expropriations Act because of the experience of another landowner. In 1961, this landowner purchased 125 acres of land two miles east of downtown London, on which he constructed a custom-built home. This landowner particularly enjoyed the peace, quiet, beauty and serenity of the area. In 1976, the MTC acquired a strip of land adjacent to his property for the purpose of constructing Highway 100. Construction of the highway was completed and it was opened to

traffic in 1977. The closest part of the highway is 32 feet from this landowner's bedroom window.

This landowner applied to the Land Compensation Board for compensation under the Expropriations Act. The Board found that the construction of the highway resulted in a reduction of $35,000 in the market value of the claimant's property and allowed compensation for injurious affection in that amount. That decision was affirmed on Appeal to Divisional Court. However, the decision was reversed on appeal to the Court of Appeal of Ontario. (See St. Pierre et al. v. Minister of Transportation and Communications, 43 O.R. (2d) 767.)

The Court of Appeal decision states that according to law no claim for compensation for damages resulting from works authorized by statute may be made unless provision is made by that or another statute for compensation. Where compensation is provided for, the specific terms of the statute must be consulted. Section 21 of the Expropriations Act provides that a statutory authority shall compensate the owner of land for loss or damages caused by injurious affection. "Injurious affection" is defined by the Act. According to that definition, the claimants must show that they would have had an action at common law for the reduction in value of the property and that the reduction resulted from the construction and not the use of the highway.

To succeed, "a physical interference with a right which the owner was entitled to use in connection with his property which substantially diminished its value" would have to be demonstrated. In other words, a claimant would have had to have a common law right of action. An example of such interference would be the use of a right-of-way, or access to a public highway. However, in the court's opinion it is not sufficient to merely show an indefinable loss of the enjoyment of the property.

The court stated that, in this case (St. Pierre), the real cause of the reduction in value was the loss of privacy, the noise, vibration, smell, fumes, and smoke which accompany any modern highway. According to common law, the loss of privacy and view of a rural landscape are not actionable and are, therefore, not compensable in this case. The noise, smell and vibration result from the use of the highway and not the construction and are therefore also not compensable under the Expropriations Act.

The court stated that although the reasonable apprehension of such complaints may result in the reduction of the value of adjacent lands and therefore be a nuisance in itself, according to common law, if no land is taken, there can be no claim for compensation based on reasonable apprehension of use. The court held that:

> Where the Expropriations Act broadens the definition of injurious affection, it does so in clear terms; where, as in this case, it employs the language of case law, it must be held that the legislature intended that the words used would have the same meaning that they had before. The reduction in the market value of the claimants' lands, caused by the apprehension that the new highway would be used for its intended purpose, was not "injurious affection" within the meaning of the Act, and is not compensable.

This landowner was recently granted leave to appeal this decision to the Supreme Court of Canada. However, one of the Ministry's lawyers involved in the case estimated that the case will not be heard until May or June, 1985.

The complainants have stated that given the uncertain nature of this area of the law, they were not willing to invest the very substantial sums which would be necessary to litigate the issue.

During the course of this investigation, I considered two issues. First, I considered whether the MTC should be responsible for the cleaning bill of $112 incurred by the complainants as a result of dust generated by the construction of the highway. Secondly, I considered whether the complainants should be compensated for the devaluation of their property due to the construction of the highway.

With respect to the cleaning bill, I am pleased to note that during the course of the investigation, as a result of a meeting with my staff, the Ministry agreed to reimburse the complainants for the cleaning bill. I therefore consider that aspect of the complaint to be resolved.

Conclusion

With respect to the second issue, it appears that the Legislature of Ontario has created in the Expropriations Act a remedy for those whose lands are injuriously affected by public works. However, as the law in Ontario now stands, the Expropriations Act does not provide compensation for the reduction in value due to the use and not the construction of that work. In my opinion, although the Expropriations Act is the appropriate remedy for those whose lands are injuriously affected, in the case of those who suffer a loss due to the use of the public works, the law is inadequate and unreasonable.

It is therefore my conclusion, pursuant to section 22(1)(b) of the Ombudsman Act, that the omission of the MTC to compensate the complainants for the devaluation of their property due to the use of the highway was in accordance with the provisions of the Expropriations Act which, as the Act applies to the circumstances of this case, are unreasonable.

Recommendation

To recommend that the Ministry compensate owners for the devaluation of their property in cases such as this would have far-reaching implications for the Ministry of Transportation and Communications (and other expropriating agencies) since undoubtedly many property values are adversely affected by the presence of public works. I am therefore recommending, pursuant to section 22(3)(a) of the Ombudsman Act, that the Ministry of the Attorney General refer the issue of compensation for injurious affection arising from the use of public works to the Ontario Law Reform Commission for a report and recommendations on this issue.

My final conclusion and recommendation were reported to the Attorney General on August 15, 1984. The Attorney General subsequently advised me that he did not intend to implement my recommendation. On March 29, 1984, therefore, I sent a copy of my report and recommendation to the Premier, pursuant to section 22(4) and (5) of the Ombudsman Act. The complainant was advised and the file was closed thereafter.

DETAILED SUMMARY NO. 9

On December 22, 1982, our Office received this complaint against a Workers' Compensation Board Appeal Board decision dated December 10, 1982. The complainant contended that the Appeal Board was unreasonable to deny him entitlement for his liver disease as being causally related to his employment with the accident employer.

On January 13, 1983, the Chairman of the Workers' Compensation Board was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complaint. The Chairman was also asked whether he was prepared to make a statement of the Board's position on the complaint. On January 21, 1983, a reply was received indicating that the Board did not wish to make a statement at that time. Our file on the complaint was assigned to a member of our investigative staff. The investigator thoroughly reviewed the complainant's Workers' Compensation Board file and considered the relevant legislation and Board policy and practice in relation to the issue.

Our investigation revealed that in November 1979, the complainant requested entitlement for his disability diagnosed as hepatitis which he related to his exposure to chemicals during his employment with the accident employer. In January 1980, the Board conducted a field investigation to determine which chemicals the complainant had been in contact with and also to obtain a job description. That investigation revealed that the complainant had commenced employment as a spot press operator on

March 8, 1972. His job consisted of grinding and sanding the rough parts of cast iron molds so that they would fit together properly. Following the sanding operation, the complainant used a rag with kerosene or alcohol to remove from his machine the blue dye that was used during the operation. His job of removing the blue dye was performed once a day. At times, the complainant also used an air hose to blow out the alcohol that settled in the grooves.

The complainant indicated that he experienced fatigue and nosebleeds approximately one year prior to reporting his condition to the Workers' Compensation Board. He sought medical attention from Dr. A, who submitted to the Board a report which showed a diagnosis of hepatitis and which recommended that the complainant find a new job. The complainant laid off work on November 2, 1979.

The complainant died on July 18, 1984, and the cause of death was liver failure secondary to his hepatoma. Since the complaint deals with a medical issue, the medical opinions expressed regarding his liver disease have been summarized as follows:

Medical Opinions:

(1) November 14, 1979 - Dr. B (Specialist in Internal Medicine)

Because of the complainant's continuing complaints, Dr. A referred him to Dr. B who performed a liver biopsy on November 7, 1979. The diagnosis was "post-necrotic type cirrhosis with changes of chronic nonspecific hepatitis". In his letter to the complainant's employer, Dr. B stated:

> ... investigation in the hospital confirmed that he had chronic nonspecific hepatitis but no evidence of any Australian Antigen or a viral particle in his blood stream or liver. Therefore, it is possible that his hepatitis is most likely due to exposure to different toxins and it is felt that further exposure may cause progression of his liver disease. It is advisable that he be placed in a job situation where exposure is minimal and should wear a mask if possible.

(2) February 20, 1980 - Dr. B

A Board investigator requested medical documentation from Dr. B. His letter to the Board reads in part:

A liver biopsy was done which showed post-necrotic type of cirrhosis with changes of chronic nonspecific hepatitis and on reviewing the biopsy, it was felt that this was probably due to a toxin causing the post-necrotic cirrhosis and causing the associated chronic hepatitis. His Australian antigen and antibody were negative and this basically includes Viral B hepatitis as a contributing factor. Viral A hepatitis is unlikely to result in this type of clinical and histological liver disease.

Therefore, in view of this man's exposure to numerous toxins at work, the possibility still remains that this probably could be an industrial exposure to the various toxins that he works with. These include kerosene and other hepatotoxins, the details of which are not available to me.

(3) March 14, 1980 - Dr. C (Medical Consultant - Occupational Health Branch - Ministry of Labour)

Dr. C visited the employer's premises on March 1, 1980 in order to observe the spotting press operation. He commented that the grinding operation was a dry process and no dust was generated during the operation. Dr. C indicated that the complainant had always worked on the spotting press operation. He expressed the opinion that the complainant's symptoms of chronic active hepatitis were unlikely to be work-related.

(4) February 23, 1981 - Dr. C

Dr. C was asked to determine if there was any possible occupational exposure of workers to chemical fumes in the plant. Dr. C noted that occupational exposure at the plant consisted of kerosene (Shell), industrial alcohol, machine cleaner solvent and blue dye. He outlined that on a yearly basis, 30 gallons of kerosene, 10 gallons of industrial alcohol, 25 gallons of machine cleaner solvent and 25 4-ounce tubes of blue dye were used at the spotting press machines. Dr. C concluded that "as the spotting press operation is intermittent and the chemicals are used (at the spotting press machines) intermittently, significant health hazard would not be anticipated provided proper work practice are maintained". (sic)

(5) January 25, 1982 - Mr. D (Industrial Hygienist - The Occupational Health Clinic, St. Michael's Hospital)

On January 25, 1982, Mr. D visited the complainant's former work site.... Mr. D was of the opinion that there was a strong possibility that the complainant's disease was work-related. His report to the Board reads in part:

> Based on the complainant's description of his previous work practices, and being aware that the complainant used a paper mask instead of an organic vapour mask, and having observed that no local ventilation has been provided in the spotting press area to remove solvent vapours, it seems quite probably that the complainant did have significant solvent exposure. It would seem that the complainant was acutely exposed to relatively high concentrations of solvents once or twice a day for periods of at least 30 minutes duration, and chronically exposed to solvent vapours for several hours throughout each shift.
>
> Since the complainant habitually worked long hours and worked on weekends, the effect of his exposure to solvents may have been greater than one might expect since he had less opportunity to eliminate any build up of toxins in his body and fully recover from his exposure of the previous working day during his time away from work.
>
> No data is available to me regarding the concentrations of solvents in the work place atmosphere. However, it is possible some estimates of what this exposure may have been one looks at the patient's history (sic). Since the complainant claims to have felt a "burning in his chest" while washing the mold with solvents, his exposure may have been greater than 400 ppm at these times. Since his paper mask was damp with solvents when he washed up, one may assume that the air he breathed had an even greater concentration of solvent than the air around the presses at this time. It is possible that at peak times his exposure to Stoddard Solvents exceeded 400 ppm and that it should be remembered that this was a job he did every working day sometimes seven days per week. (sic)
>
> . . . .
>
> The work practices used by the complainant - the blowing around of solvents with compressed air and

the impregnation of his clothing and paper mask with solvents - are conducive to generating high concentrations of mist and vapour in the atmosphere which will coat surrounding surfaces with solvents which will continue to evaporate more slowly. Thus, there is a possibility of absorbing solvents through inhalation and skin absorption. No local ventilation, organic vapour masks, work practice controls or other administrative controls were used which could have reduced the solvent exposure.

Since the complainant has developed health problems, solvents have been handled more carefully in the spotting press area and the solvent exposure has been divided among several people at the plant.

No one else in the shop did the same job as the complainant nor had a similar exposure to solvents, and therefore it is not particularly remarkable that no one else in the plant has had similar problems.

(6) February 24, 1982 - Dr. E (Occupational Health Clinic Unit, St. Michael's Hospital)

Dr. E reviewed the complainant's records and in his report dated February 24, 1982, Dr. E indicated that the most likely explanation of the complainant's liver disease was his prolonged exposure to hepatotoxic agents which were not severe. His report reads in part:

> The most likely explanation therefore, is a prolonged exposure to not severely hepatotoxic agents. Occupational exposures are immediately the most likely to fit into this category. This man did have exposure on a consistent basis with ethyl and methyl alcohol and other solvents at work. Alcohols will potentiate the hepatotoxic effect of other agents. The aromatic components of Stoddard's solvent or kerosene could be hepatotoxic. Butyl cellusolve in the dye he was using, will, if absorbed through the skin exert a hepatotoxic effect. His complete exposure history appears to be unknown. Although it is reported he could have used less solvent on his job, he appears in fact to have had a fair amount of exposure, including wetting of his work clothes. Therefore this man's liver disease is most likely due to occupational exposures, some of it at least solvent exposure.

(7) July 19, 1982 - Dr. F (Gastroenterologist)

Dr. J, a Board Industrial Medicine Consultant, wrote to Dr. F on June 28, 1982 and requested that he review the complainant's file and provide the Board with his opinion regarding the complainant's case. His reply reads:

> ... The most interesting piece of information I felt was in relation to the fact that from 1972 to 1980, he was a plastic mold scaler with hand grinding of plastic and requiring brushing the grease from the molds and cleaning the molds. This could result in him coming in contact and inhaling significant quantities of a polyvinyl chloride monomer which is undoubtedly hepatotoxic. The questions I have therefore are: - is there any knowledge at all about the concentrations of this substance in the atmosphere at this time? My opinion would rest in this area since liver disease has been described in workers who have to clean out the vats in a plastic factory.

(8) September 23, 1982 - Dr. F

On September 9, 1982, Dr. J telephoned Dr. F and informed him that the complainant was grinding metal molds and that there was no vinyl chloride present. Dr. F replied:

> I apologize for the delay in sending my final report following our telephone conversation and confirmation from you that the above was not in contact with vinyl chloride monomer. In that situation therefore, I am not able to find any apparent evidence of hepatotoxicity of any of the agents which he was in contact with.

(9) October 19, 1982 - Dr. E

The complainant's representative wrote to Dr. E and requested his comments on Dr. F's September 23, 1982 report. His reply reads, in part:

> I do not believe there is much that we can add to our case about this gentleman. Dr. F is a new person on the hepatology scene in Toronto as far as I know. One could comment that it is unclear from Dr. F's submission to Dr. J on September 23rd of this year to what extend (sic) he in fact searched the literature for the hepatotoxicity of the various agents involved.

> It may be beneficial in restating the case to point out that it rests not only on the lack of a better medical hypothesis (after considerable investigation) for this man's liver disease, but also upon uncertainties in this man's exposure history both for the extend (sic) of exposure and the kind. If I remember the information correctly from the mass of data we had on the complainant, his exposures at the time that he finished working were relatively well known; but those earlier on in his employment are less clear. I believe there was some reference in the complainant's remarks about the solvents that he used that did include some reference to chlorinated hydrocarbons which would much more likely be used in the early seventy's than the late seventy's...

(10) April 8, 1983 - Dr. J - a Board Industrial Medical Consultant

Dr. J reviewed the complainant's file and expressed the opinion that:

> To presume relationship of this liver complaint to solvent toxicity in a dry grinding operation would be more remote than the usual causes for this complaint, i.e., nutritional and viral. [Dr. J's emphasis]

(11) November 16, 1983 - Dr. J (Memo #71)

In reviewing the complainant's file further, Dr. J noted that the argument of the claim supporters rests on:

> 1. lack of a better medical hypothesis after considerable investigation of this man's liver disease.
>
> 2. uncertainties in this man's exposure history.

Dr. J reiterated that with respect to point #1, to presume a relationship of the complainant's liver complaint to his exposure would be more remote than the usual nutritional and viral causes for his complaint. Dr. J further commented that, with respect to point #2, if there were uncertainties in the complainant's exposure history, then the Appeal Board should decide.

(12) May 18, 1984 - Dr. G (Specialist in Gastroenterology and Hepatology)

As part of our investigation, our Office retained an independent specialist to review the complainant's file.

After reviewing the available medical documentation in conjunction with the November 1979 liver biopsy which was obtained from a local hospital, Dr. G commented:

> To date there is no objective published scientific evidence to support a distinct cause and effect relationship between either chronic active hepatitis or cirrhosis and the solvents to which the complainant was exposed. It is worthy of note however that many cases of cirrhosis are seen each year by hepatologists for which there is no known etiology. It is certainly not beyond the bounds of possibility that one or more as yet unidentified solvents contributes to the pathogenesis of such cases. Coupled with the observation that the complainant's gamma GT improved after withdrawing from the work environment in my judgement a cause and effect relationship can not be absolutely excluded. Under such circumstances and after reviewing very carefully all the available data in this case, it is my feeling that the complainant should receive the benefit of any doubt and his claim should be supported.

(13) June 27, 1984 - Dr. K (Board Industrial Medical Consultant)

A copy of Dr. G's report was referred to the Appeal Board panel for its consideration. On receipt of the report, Dr. K was asked to review the complainant's file. Her response reads, in part:

> As I review the issues presented here, the gamma GT test is just one of a variety of tests to determine liver function. Improvement in one test is not highly significant. Not withstanding this feature, there are many postulated reasons for such improvement. Simply removal from the work place does not, on a scientific basis, lead to a causal relationship.
>
> Overall, from a scientific/medical standpoint, there is no evidence to support chronic hepatitis as being caused by occupational solvent exposure. The substances are well known in the industrial climate and over the years sufficient study has been done and

chronic hepatitis has not been identified as an adverse health affect. I do not feel that there is sufficient evidence to support an occupational relationship in this worker's chronic hepatitis.

(14) August 15, 1984 - Dr. H (Specialist, a local clinic of the Ontario Cancer Foundation)

Our Office wrote to Dr. H who was the attending specialist at the time of the complainant's death. Dr. H indicated that the cause of death was liver failure secondary to his hepatoma. Dr. H noted that the autopsy report did not give any clues as to the etiology of the complainant's cirrhosis.

During the course of this Office's investigation, I reached the tentative conclusion pursuant to section 22(1)(b) of the Ombudsman Act, that, "The Appeal Board unreasonably concluded that the complainant's liver disease was not causally related to his employment with the accident employer". The Chairman and the accident employer were advised of my possible conclusion and recommendation in a letter dated December 3, 1984. The reasons for my tentative opinion were as follows:

1. The complainant advised the Appeal Board panel that in the early years of his employment, he was not provided with any protective clothing. He supplied his own paper mask, leather apron and cloth gloves. However, he further stated that even with the mask and apron, he was exposed to kerosene fumes and his paper mask and clothing were soaked with kerosene as well as blue dye.

The general foreman informed the Appeal Board panel that during the clean-up operation, the complainant used compressed air to blow off excess kerosene from the molds. This procedure has been changed since the complainant left his employment and excess kerosene is wiped up rather than blown away.

In my opinion, the general foreman's explanation of the procedure used to remove the excess kerosene confirms the complainant's statement with respect to his clothing being soaked with kerosene.

2. The general foreman also informed the panel that he had not been aware of any other employees with a problem similar to the complainant's. However, between 1972 and 1979, the complainant was the only employee working on the spotting press machine. It should be noted that no other employee performed the same job as the complainant. Consequently, the fact that no other employees suffered from a similar problem is, in my opinion, irrelevant in this case.

3. Dr. C suggested in February, 1981 that employees working on the spotting press machines "should wear protective clothing, eye protection, impervious gloves and an approved respirator (organic vapour) while applying the blue dye, and while cleaning the dye with industrial alcohol or kerosene". I have noted that none of these items were provided during the complainant's employment from 1972 to 1979.

4. Dr. E, in his February, 1982 report, indicated that the complainant did have exposure to ethyl and methyl alcohol and other solvents on a regular basis. Dr. E expressed the opinion that alcohol would "potentiate the hepatotoxic effect of other agents". He further stated that "the aromatic components of Stoddard's solvent or kerosene could be hepatotoxic". Dr. E was also of the opinion that "butyl cellusolve in the dye [the complainant] was using, will, if absorbed through the skin, exert a hepatotoxic effect".

5. The complainant was investigated for hepatitis during his admission to St. Michael's Hospital from November 13, 1981 to December 23, 1981. Dr. E was of the opinion that the toxic chemical exposure at work contributed to the complainant's liver disease. In support of his opinion, Dr. E noted the complainant's work exposure and concluded that the history of exposure was compatible with the pattern of onset found in such illnesses. He further stated that the complainant's exposure would not have been confined to his breathing the toxins but also there could have been absorption through the skin if the chemicals came in contact with his clothing.

6. Mr. D visited the complainant's work site and, as well, reviewed literature pertaining to toxic chemical exposure. Mr. D expressed the opinion that:

> In view of the fact that the complainant has had no previous history of liver disease that he consumed very little alcohol, that there is evidence of a significant exposure to potentially hepatotoxic substances in his workplace, and that it is known that chronic active hepatitis can be caused by exposure to chemicals, I feel that there is a strong possibility that his disease is work related.

7. Independently, both Dr. E and Mr. D reached the conclusion that there was a probable relationship between the complainant's work exposure and his liver disease.

8. I have given careful consideration to the medical opinions expressed by Dr. J and Dr. K who concluded that the complainant's liver disease was not related to his work exposure. I am also aware that Dr. F did not support a relationship. However, he did not substantiate his decision with detailed reasons. In addition, I have noted that Dr. G is in agreement with the Board physicians that there is no objective published scientific evidence to support a distinct cause and effect relationship. However, after reviewing all the available information, he expressed the opinion that the complainant should receive the benefit of any doubt and his claim should be supported.

I tentatively recommended, pursuant to section 22(3)(g) of the Ombudsman Act that, "The Appeal Board should revoke its decision and grant the late complainant entitlement for his liver disease as being causally related to his employment with the accident employer".

The Chairman's response, which was received on February 21, 1985, reads in part:

> The Appeal Board has carefully considered your detailed report in this case. On the basis of the available medical evidence, the panel continues to be of the view that the preponderance of such evidence is not supportive of a causal relationship between the complainant's exposure to solvents etcetera (sic), at work, and the development of his liver disease.
>
> In reviewing the medical evidence to which you refer, only Dr. E gives unqualified support to a relationship, in his report of February 24, 1982. His later report of October 19, 1982 is much less emphatic, suggesting that the case for a relationship rests on "the lack of a better medical hypothesis" and "upon uncertainties in this man's exposure history".
>
> The remaining medical evidence is either quite definitely non-supportive, or supportive subject to significant qualifications.
>
> In his report of November 14, 1979, Dr. B suggests that "it is possible" the complainant's hepatitis is related to exposure to toxins. In a subsequent report of February 20, 1980, he reports that "the possibility still remains" that it "probably" was related.
>
> Mr. D, an Industrial Hygienist, concedes that he has no data regarding concentrations in the workplace. He goes on to speculate that "estimates" of exposure are "possible", based on

the complainant's history. He concludes that "it is possible" that at peak times, exposure to Stoddard Solvent exceeded 400 ppm. This hypothesis should, of course, be considered in the context of the opinions from Drs. J, G, K and F, none of whom found that the complainant was exposed to liver toxins.

While you appear to place reliance on Dr. G's report as evidence in the complainant's favour, it must be pointed out that the doctor's opinion is rather strongly qualified. He premises his view by making the statement that "there is no objective published scientific evidence to support a distinct cause and effect relationship" and then adds that "a cause and effect relationship cannot be absolutely excluded".

The medical evidence against a finding of relationship is, in the panel's view, much more emphatic. Dr. C in his report of March 14, 1980, expressed the opinion that the complainant's liver disease was "unlikely" to be work related. The panel considers this to be a stronger statement than Dr. B's opinion, when he suggested that a relationship was "possible".

Dr. F, in his report of September 23, 1982, also exhibited more positive views when he stated "I am not able to find any apparent evidence of hepatotoxicity of any of the agents which he was in contact with". Dr. F, a Specialist in Gastroenterology, would certainly have specialized knowledge and expertise in the identification of hepatotoxins and the Appeal Board placed considerable weight on his opinion in this regard.

Dr. J, the Board's Industrial Medicine Consultant and a physician with many years of experience in analyzing cases of liver disease and hepatotoxic agents, was also quite definite in her opinion as quoted at the bottom of page 7 of your report. Dr. J confirmed this opinion subsequently, after further review of the complainant's file.

Dr. K, also an Industrial Medicine Consultant with considerable expertise in this field of medicine, was equally emphatic in her report of June 27, 1984 when she stated that:

> Overall, from a scientific/medical standpoint, there is no evidence to support chronic hepatitis as being caused by occupational solvent exposure. The substances are well known in the industrial climate and over the years sufficient study has been done and chronic hepatitis has not been identified as an adverse health affect. I do not feel that there is

> sufficient evidence to support an occupational relationship in this worker's chronic hepatitis.
>
> In the Appeal Board's opinion, the combined weight of the medical opinions from Drs. C, F, J and K, all of which are equivocal in their failure to find a causal relationship, by far exceeds the more speculative and qualified opinions from Drs. B, E and G, and the report from Mr. D.

The Chairman concluded by stating that the Board would not take any steps to implement my tentative recommendation.

I have again considered this case in light of our investigation and the Board's representations. The accident employer did not respond to my December 3, 1984 letter.

In my view, this case is of significance not only to the complainant's family, but because it also addresses the Board's approach to the adjudication of industrial disease claims. I am of the opinion that Professor Paul C. Weiler captured the issue of the Board's approach to industrial disease. It is Professor Weiler's opinion that:

> The function of a general standard in a compensation program is to give to diseased workers who satisfy it routine acceptance of their claim without requiring specific scientific proof that the disease came from workplace exposure....
>
> While it is important that the Board, in formulating general policy standards for compensating disease claims, draw a reasoned and responsible line, it is not essential that this be a scientifically demonstrable line.....
>
> . . . .
>
> ... the lack of strong scientific evidence in the vast majority of cases gives rise to the difference between the scientific and the compensation perspective. The scientist can answer that we do not know yet, that we do not have enough data, that we need to await more and better studies. This is the responsible reply dictated by the canons of the scientific method. But the WCB does not have the luxury of saying that it doesn't know, that it won't commit itself. The Board has to decide the case one way or the other. If it decides not to compensate the claim, this implicitly renders a negative verdict on the issue of causality. However, the fact that the scientific evidence is unclear or debatable no more supports the negative than it does the positive conclusion on this issue. In this setting the WCB must frankly recognize that the

> scientific material leaves the issue unsettled, and that an informed but pragmatic judgment must be made about which way the available evidence seems to point.
>
> [Protecting the Worker from Disability: Challenges for the Eighties by Paul C. Weiler, April, 1983]

Like Professor Weiler, I am of the opinion that an injured employee should not be penalized because of lack of objective scientific data pertaining to a relationship between the worker's disability and his employment.

With specific reference to this case, I have noted the following medical opinions which, in my view, support my recommendation:

(1) In his February 20, 1980 letter to the Board, Dr. B was of the opinion that, "...in view of this man's exposure to numerous toxins at work, the possibility still remains that this probably could be an industrial exposure to the various toxins that he works with".

(2) Dr. E was of the opinion that the toxic chemical exposure at work contributed to the complainant's liver disease.

(3) Mr. D felt that there was "a strong possibility" that the complainant's liver disease was work-related.

(4) Dr. G was of the opinion that the complainant should receive the benefit of any doubt and his claim should be supported.

There is no evidence to suggest any other causes for the complainant's liver disease other than his work. In the absence of such evidence, it is reasonable to accept the above medical evidence which supports a relationship between the complainant's liver disease and his employment. Professor Weiler clearly pointed out that, in many cases, there is a lack of scientific evidence to establish a relationship between an industrial disease and the work environment. Given the facts of this case, it is my opinion that the Board acted unreasonably by not addressing the spirit of the legislation of the Workers' Compensation Act.

It is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board unreasonably concluded that the complainant's liver disease was not causally related to his employment with the accident employer. I recommend, therefore, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and grant the late complainant entitlement for his liver disease as being causally related to his employment with the accident employer.

This recommendation was included in a report to the Chairman dated March 13, 1985.

The Board had not responded to the report and recommendation by March 29, 1985. I therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 10

The complaint against Appeal Board decisions of the Workers' Compensation Board dated September 8, 1980 and October 29, 1981 was registered with this Office through correspondence received May 23, 1982.

On July 27, 1982, a letter was sent by our Office to the Chairman of the Workers' Compensation Board in accordance with the requirements of the Ombudsman Act, advising him of our intention to investigate this complaint. In our letter, the complaint was summarized as follows:

1. That the permanent partial disability award of 2% does not adequately reflect the residual disability for the tinnitus.

2. That he is entitled to a permanent partial disability award as a result of his hearing loss suffered while in the course of his employment as a result of exposure to noise.

3. That he is entitled to benefits under section 42(5) of the Workmen's Compensation Act.

We also asked the Chairman whether he was prepared to give a statement of the Board's position on the complaint. The Assistant Secretary replied on behalf of the Chairman in a letter dated August 11, 1982, which stated that, since the complaint filed with the Ombudsman and the issue dealt with by the Appeal Board appeared to be the same, he did not wish to make a statement at that time.

The file was subsequently assigned to a member of my investigative staff for investigation. In a report dated July 14, 1982, the Ombudsman found that the complainant's request for an increase in his 2% award for tinnitus and entitlement to benefits under section 42(5) of the Workmen's Compensation Act [now section 43(5) of the Workers' Compensation Act] could not be supported. Consequently, this report deals only

with the complainant's request for a permanent partial disability award for his hearing loss.

During her investigation into this complaint, my investigator conducted a thorough review of the complainant's Workers' Compensation Board claim file supplied by the Board; also considered were the relevant legislation, policy and practices of the Workers' Compensation Board in relation to the issue.

The Ontario Rating Schedule specifies that a pension will be allocated starting at a 35 decibel bilateral hearing loss. The same schedule states that a 1% pension is given for a 30+ dB loss in one ear. Board officials have explained that this latter provision applies to traumatic hearing loss only. Lastly, the schedule notes that where the worker is over 60 years of age, the compensable hearing loss is arrived at by deducting from the actual hearing loss .5 dB for each year over 60 years of age.

Audiologists from McMaster University Medical Centre and the Canadian Hearing Society were interviewed. The Senior Pensions Medical Examiner for the Canadian Pensions Commission at Sunnybrook Hospital was interviewed on August 20, 1982 and Dr. A, otolaryngologist in chief at a large metropolitan hospital, was seen on November 4, 1982. At that time, copies of his monographs on hearing loss were obtained. Seminars on noise given by the Canadian Acoustical Association were attended by my investigator in the fall of 1982. The complainant was contacted for his comments as well.

The information obtained by my Office has revealed that the complainant, an electrician, began experiencing tinnitus while working for the accident employer in 1974. He saw otolaryngologist Dr. G on June 23, 1975, who sent a letter and report to the Workers' Compensation Board on the following July 4 and 7 respectively. Dr. G mentioned a persistent buzzing in the right ear and diagnosed a high frequency hearing loss of 32.5 dB in the right ear (which would average to 35 dB) and 24 dB in the left ear (which would average to 25 dB).

A further audiogram, taken by Dr. G on March 30, 1976, revealed a right-sided hearing loss of 35 dB and a left-sided hearing loss of 30 dB. A Claims Review Branch decision of August 13, 1976 denied the complainant's claim for industrial hearing loss on the basis that his five-week exposure to high noise levels was insufficient to have caused the hearing loss.

The complainant appealed this decision and further investigation was carried out by the Board regarding noise levels in his working environment. An appointment was also set up by the Board for the complainant to see otolaryngologist Dr. A. Dr. A's examination of

January 4, 1978, revealed a troublesome tinnitus and a 35 dB hearing loss in the right ear, with a 30 dB loss in the left.

A Commissioner of the Board decision dated March 6, 1978 awarded the complainant a 2% pension for tinnitus. He was granted entitlement for minimal hearing loss but no award was made, as the hearing loss was insufficient according to the criteria for allowance of a pension.

Following receipt of this report, the Appeal Board directed that the complainant be seen by Dr. A to be assessed again. However, the complainant requested an immediate decision from the Appeal Board which, on September 8, 1980, found that when the complainant was last examined in January of 1978, following his removal from the high noise levels, his hearing loss did not meet the criteria for allowance of a permanent partial disability award. Consequently, the appeal was denied.

During the course of this investigation, the Ombudsman formed the view that it might be open to him to make a report that would justify a possible conclusion and recommendation pursuant to section 22 of the Ombudsman Act. In a letter dated July 28, 1983, written pursuant to section 19(3) of the Ombudsman Act, he advised the Chairman of this possible conclusion and recommendation:

> Possible Conclusion
>
> It would appear that it may be open to me to conclude, pursuant to s. 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of September 8, 1980, was unreasonable to deny the complainant's request for a pension for his hearing loss. In support of this conclusion, I note the following points and arguments.
>
> It is generally agreed that a decrease in hearing after a person has been removed from the workplace cannot be attributed to the working environment. Therefore, it does not seem to me that the Appeal Board's decision to disregard Dr. G's report of 1980 was unreasonable. However, all reports agree that the complainant's hearing loss was in the area of 35 dB in the right and 30 dB in the left ear. The Ontario Rating Schedule states that, for partial hearing loss - one ear only - a 1% pension shall be allocated for a 30 dB plus hearing loss. It has been explained in conversation between the Board and this Office that, although not stated in the policy, this applies only to traumatic deafness. It would appear to me that it is unreasonable for Board policy, in principle, to allow entitlement to a person with a 30 dB loss in one ear and none in the other while it denies the complainant a pension when he has, by

common consent, a 35 dB loss in one ear and a 30 dB loss in the other. What this means is that, as far as I can determine, under existing Board policy, theoretically one person could be more disabled than another and yet, the less-disabled person would be the only one eligible for a pension.

Because I am of the opinion that, regardless of work-related hearing loss origin - traumatic or noise-induced - the resultant handicap should be compensated in an equitable and consistent fashion, I am of the tentative view that the Board's denial of the complainant's request for a pension was unreasonable.

Possible Recommendation

It would appear that it may be open to me to recommend, pursuant to s. 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision of September 8, 1980, and award the complainant a pension for his hearing loss.

The Board and the accident employer were notified of the Ombudsman's possible conclusion and recommendation and given the opportunity to make representations.

In a letter dated August 15, 1983, the Safety Coordinator of the Western Ontario division of the accident employer responded to the Ombudsman's letter. He did not feel that the complainant's six weeks with the accident employer warranted any change in his status and pointed out that the complainant had refused to wear hearing protection until he had been on the job for three weeks.

The Workers' Compensation Board did not respond by letter; instead, a meeting was set up between Dr. E, Hearing Loss Claims, Dr. F, Director of the Medical Branch, and the Assistant Secretary of the Board, with an Assistant Director and the investigator, of my Office. This took place on September 30, 1983, at which time the Board made the following points.

(1) The Board felt that as Dr. A was a pre-eminent specialist with the finely calibrated equipment of a large metropolitan hospital at his disposal, his or Dr. D's assessment of hearing loss should be accepted over all others.

(2) With regard to the matter of the pension for partial hearing loss of 30+ dB in one ear resulting from trauma, but nothing if the hearing loss was noise-induced and bilateral as long as the loss in both ears did not exceed 35 dB, the Board's position was that we did not

have the medical expertise necessary to arrive at this opinion. Dr. E stated that there was a different kind of damage that could happen in the case of trauma, and that adjustment would be more difficult for the person with a traumatic hearing loss.

The investigator told the Board representatives that she had done extensive research and interviewing on this subject; none of the audiologists with whom she had talked had shared the Board's opinion, nor had Dr. A. Both Dr. F and Dr. E were of the opinion that if Dr. A were to say that a person with a bilateral loss of 30 dB would be more handicapped than a person with traumatic hearing loss of over 30 dB in one ear, then the Board would reconsider its position. Accordingly, it was decided that our Office would write a letter to Dr. A asking him to examine the complainant and two other complainants in this regard.

Both our position and the Board's were put to Dr. A and his considered opinion on the following was sought:

> Are [the complainant], Mr. [ ] and Mr. [ ] with their bilateral hearing losses apt to be as handicapped or more so than a person with normal hearing in one ear and a traumatic hearing loss of 30 dB plus (but less than 35 dB) in the other?

Dr. A responded by way of a letter dated November 14, 1983. He responded to the question as follows:

> In general terms, the person with a 35/25 dB hearing loss is the more handicapped. If you note the Board's tables, they give a significant weighting to the better ear and a better ear of 25 dB loss is handicapping whereas a better ear of 0 dB loss is not. When the two ears are compounded together, the 25 dB loss in the better ear dominates the handicap rating. Therefore, I believe that all three claimants are more handicapped than your hypothetical person.

This response along with our original letter was forwarded to the Board for its consideration.

The Assistant Secretary of the Board notified my investigator in December of 1983 that Drs. E and F had certain representations they wished to make, but because of their technical nature, felt that the purpose could be best served during a meeting, preferably under the auspices of the new Ombudsman. Accordingly, a meeting was scheduled for March 22, 1984, with Dr. E, Dr. F, the Vice Chairman of Appeals, and the Assistant Secretary from the Board, and the Assistant Director, a counsel and the investigator from my Office.

During the meeting, Drs. E and F basically expanded upon their major points from the September meeting. That is, Dr. E gave detailed explanations for accepting audiological results from a large metropolitan hospital (where Drs. A and D practice) over any others. Despite Dr. A's opinion, the Board continued to hold that traumatic hearing loss of 30+ dB in one ear would be more serious than bilateral hearing loss of approximately 35/25 dB and, again, stated that we did not have the medical expertise to make a decision in this matter.

I have reviewed all the information on file, considered the extensive research carried out by my staff and carefully noted the Board's representations.

In respect to the Board's position that audiological tests from one large metropolitan hospital should take precedence over all others, I am, as a general rule, persuaded that this is not an unreasonable position. The clinical setting and equipment at this hospital are acknowledged to be of the highest caliber. Audiologists at this hospital have tested over 6,500 Workers' Compensation Board hearing loss cases in the last 11 years; their work is exhaustive and complete. The Board does not have its own medical personnel to carry out hearing loss assessments as it does for other disabilities. It seems only reasonable that the Board should seek and depend on expert testing for the purposes of pension assessment. Thus, I am not prepared to conclude that the Board was unreasonable to accept Dr. A's results over those of Dr. G when assessing the extent of the complainant's hearing loss.

The last area of contention involves the Board's policy of allowing a 1% pension for a traumatic hearing loss of 30 dB plus in one ear and no hearing loss in the other, while not allowing a pension for noise-induced bilateral hearing loss of 35 dB plus in one ear but under 35 dB in the other. The Board has argued that these are two different clinical entities and that traumatic loss takes much more adaptation than gradual hearing loss.

I have seen no medical evidence to support this position in any of the medical texts researched. Dr. A's letter makes very clear that, in general, the traumatic hearing loss would not be as handicapping at this minimal level as would the bilateral noise-induced hearing loss. The Board has presented no information to substantiate its position and I can only be persuaded by the evidence available. I therefore conclude that the Board has unreasonably denied the complainant a pension as his hearing loss is beyond that which would make him eligible for a hearing-loss pension were he to be suffering from a traumatic hearing loss.

Lastly, I think it only appropriate to comment on my regret that the investigation of this case could not have been completed

earlier. Essentially, the Board's position has not changed from its meeting with my staff in September of 1983. Yet, at that time, the Board representatives gave my staff to understand that were Dr. A's opinion to support the bilateral hearing loss question, then the Board would be significantly influenced and reconsider its position. However, it was apparent from the March meeting that, despite Dr. A's statements, the Board had not changed its position. While I do not question the Board's right to maintain a different position from that of my Office, I would prefer that the Board be candid about such differences and not hold out the possibility of reconciliation if none exists.

Accordingly, it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board's decision of September 8, 1980 was unreasonable in denying the complainant a pension for his hearing loss. It is, therefore, my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Workers' Compensation Board should revoke its decision of the aforementioned date and award the complainant a pension for his occupational hearing loss.

I forwarded this report to the Chairman of the Board on August 22, 1984. On November 1, 1984, he wrote that the Board would be conducting an exhaustive review of its policy on hearing loss claims, the conclusions of which he would make known to me. Because of the review to be undertaken, the Chairman thought it would be premature to respond to individual recommendations. In a follow-up letter of February 4, 1985, I was informed that the review would not be finished until June 1985. Because I did not feel this complainant should be further prejudiced by having to attend the outcome of a general policy review, I sent a copy of my report to the Premier on March 7, 1985. The complainant was advised of the results of my investigation and the file was closed.

DETAILED SUMMARY NO. 11

The complaint against an Appeal Board decision of the Workers' Compensation Board dated October 5, 1981 was brought to this Office's attention during a personal interview on February 15, 1982.

On May 21, 1982, a letter was sent by our Office to the Chairman of the Workers' Compensation Board in accordance with the requirements of the Ombudsman Act, advising him of our intention to investigate this complaint. In our letter, the complaint was summarized as follows:

> That the Appeal Board in its decision dated October 5, 1981 was unreasonable to deny entitlement for a permanent disability award for his compensable bilateral hearing loss.

We also asked the Chairman whether he was prepared to give a statement of the Board's position on the complaint. In a letter dated June 1, 1982, the Board indicated that since the complaint filed with the Ombudsman and the issue dealt with by the Appeal Board appeared to be the same, it did not wish to make a statement at that time.

The file was subsequently assigned to a member of my investigative staff for investigation. During her investigation, the investigator conducted a thorough review of the complainant's Workers' Compensation Board claim file supplied by the Board; also considered were the relevant legislation, policy and practices of the Workers' Compensation Board in relation to the issue.

The Ontario Rating Schedule specifies that a pension will be allocated starting at a 35 dB bilateral hearing loss. The same schedule states that a 1% pension is given for a 30+ dB loss in one ear. Board officials have explained that this latter provision applies to traumatic hearing loss only. Lastly the schedule notes that where the worker is over 60 years of age, the compensable hearing loss is arrived at by deducting from the actual hearing loss .5 dB for each year over 60 years of age.

Audiologists from McMaster University Medical Centre and the Canadian Hearing Society were interviewed. The Senior Pensions Medical Examiner for the Canadian Pensions Commission at Sunnybrook Hospital was interviewed on August 20, 1982 and Dr. A, otolaryngologist in chief at a large metropolitan hospital, was seen on November 4, 1982. At that time, copies of his monographs on hearing loss were obtained. Seminars on noise given by the Canadian Acoustical Association were attended by my investigator in the fall of 1982. The complainant was contacted for his comments as well.

The information obtained by my Office has revealed that, after 24 years with the accident employer, the complainant filed a claim for noise-induced hearing loss with the Workers' Compensation Board in July 1979. The complainant worked with turbines while at the accident employer and retired in 1978.

On July 31, 1979, Dr. H, otolaryngologist, submitted to the Workers' Compensation Board an audiogram for the complainant which revealed a hearing loss of 35 decibels in the left ear and 40 decibels in the right. The doctor's enclosed report stated, in part, that the complainant had "a high tone hearing loss, the result of exposure to noise at work."

Entitlement was denied by the Claims Review Branch in April, 1980 because of lack of exposure to hazardous levels of noise in the work place. A second audiogram by Dr. H on May 6, 1980 revealed a bilateral hearing loss of 40 dB.

In August of 1980, the Appeals Adjudicator confirmed the Claims Review Branch decision. When the complainant appealed this, the Appeal Board requested that further testing both at the work place and on the complainant be undertaken. Accordingly, the complainant was seen by Dr. D, otolaryngologist, on August 21, 1981. Dr. D opined that the complainant's hearing loss was likely due to industrial noise exposure; the audiogram taken at the time revealed that there was a 25 dB hearing loss in the left ear and a 35 dB loss in the right. Based on this audiogram and further tests undertaken at the accident employer, the Appeal Board, in its decision of October 5, 1981, accepted that the complainant's hearing loss was the result of noise exposure at work and granted him entitlement for medical aid benefits. However, because the audiogram taken by Dr. D did not record a bilateral hearing loss of 35 dB, the complainant was refused a pension.

On October 9, 1981, the complainant saw Dr. J, otolaryngologist at a university Medical Centre, who reported that his audiometric test for the complainant revealed a bilateral hearing loss of 35 dB. Accordingly, on October 22, 1981, the complainant requested that the Appeal Board reconsider its decision on the basis of this new evidence.

The Appeal Board, in its decision of December 11, 1981, accepted the findings of Dr. D and the opinion of the Board's Medical Branch that the audiometric test of October 9, 1981 detected deterioration of hearing loss due to aging and inconsistent responses during testing. Reconsideration was denied.

During the course of this investigation, the Ombudsman, formed the view that it might be open to him to make a report that would justify a possible conclusion and recommendation pursuant to section 22 of the Ombudsman Act. In a letter dated July 28, 1983, written pursuant to section 19(3) of the Ombudsman Act, he advised the Chairman of this possible conclusion and recommendation:

> Possible Conclusion
>
> It would appear that it may be open to me to conclude pursuant to section 22(1)(b) of the Ombudsman Act that the Appeal Board decisions of October 5, 1981; December 11, 1981; and March 17, 1982 were unreasonable to deny the complainant's request for a pension for his hearing loss. In support of this conclusion I note the following points and arguments.
>
> There is an essential divergence of medical opinion in this case. Three audiometric tests undertaken by specialists on July 31, 1979; May 6, 1980; and October 9, 1981 all revealed a pensionable loss of hearing according to the Board's policy. The Board accepted the only test result which did not show a

pensionable hearing loss. Notwithstanding the opinion of Dr. D, I would point out that the preponderance of medical evidence clearly supports entitlement to a pension. Moreover, there is no evidence to indicate that Drs. H and J are not equally qualified specialists whose finding should be given the same individual weight as Dr. D's.

In reference to the Medical Branch's opinion that aging may have contributed to the deterioration of hearing loss in the complainant's last audiometric test, I would point out that there was only a seven-week difference between the testing conducted by Dr. D and Dr. J. My investigator spoke to several audiologists on this point and none thought that, in seven weeks, aging would be responsible for the hearing loss difference in those two tests.

I would also like to address the issue that, even by Dr. D's calculations alone, the complainant has at least a 35 decibel loss in one ear. The Ontario Rating Schedule states that, for partial hearing loss - one ear only - a 1% pension shall be allocated for a 30 decibel plus hearing loss. Although not specifically stated as such in the policy, Board officials have informed us that this refers to traumatic hearing loss only. It is accepted that the complainant has more of a hearing loss than this. It would appear to me that it is unreasonable for Board policy, in principle, to allow entitlement to a person with a 30 decibel loss in one ear and none in the other, while it denies the complainant a pension when he has, by the very lowest reckoning, a 35 decibel loss in one ear and a 30 decibel loss in the other.

I am of the opinion that regardless of the origin of work-related hearing loss - traumatic or noise-induced - the resultant handicap should be compensated in an equitable and consistent fashion. In the complainant's case, since the clear majority of medical evidence was not accepted, I am of the tentative view that the Board's denial of a pension was unreasonable.

Possible Recommendation

It would appear that it may be open to me to recommend, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decisions of October 5, 1981; December 11, 1981; and March 17, 1982 and award the complainant a pension for his hearing loss.

The Board and the accident employer were notified of the Ombudsman's possible conclusion and recommendation and given the opportunity to make representations.

Mr. K, counsel for the employer, replied on behalf of the employer in a letter dated August 18, 1983. He requested a certain amount of time in order to obtain access to the Workers' Compensation Board claim file. In a letter dated March 19, 1984, Mr. K sent this Office a letter outlining the hazardous noise levels to which the complainant had been exposed and his opinion that they were not sufficient to cause a hearing loss. However, this was not an issue before the Ombudsman, as the Appeal Board has accepted that sufficient noise levels existed. Mr. K's other argument was that the Workers' Compensation Board's criteria for disability awards were reasonable and should be accepted. In summary, Mr. K argued that the complainant does not fall within the eligibility requirements of the Workers' Compensation Act and therefore should not be entitled to receive benefits.

The Workers' Compensation Board did not respond by letter; instead, a meeting was set up between Dr. E, Hearing Loss Claims, Dr. F, Director of the Medical Branch, and the Assistant Secretary of the Board, with an Assistant Director and the investigator, of my Office. This took place on September 30, 1983, at which time the Board made the following points.

(1) The Board felt that as Dr. A was a pre-eminent specialist with the finely calibrated equipment of a large metropolitan hospital at his disposal, his or Dr. D's assessment of hearing loss should be accepted over all others.

(2) With regard to the matter of the pension for partial hearing loss of 30+ dB in one ear resulting from trauma, but nothing if the hearing loss was noise-induced and bilateral as long as the loss in both ears did not exceed 35 dB, the Board's position was that we did not have the medical expertise necessary to arrive at this opinion. Dr. E stated that there was a different kind of damage that could happen in the case of trauma, and that adjustment would be more difficult for the person with a traumatic hearing loss.

The investigator told the Board representatives that she had done extensive research and interviewing on this subject; none of the audiologists with whom she had talked had shared the Board's opinion, nor had Dr. A. Both Dr. F and Dr. E were of the opinion that if Dr. A were to say that a person with a bilateral loss of 30 dB would be more handicapped than a person with traumatic hearing loss of over 30 dB in one ear, then the Board would reconsider its position. Accordingly, it was decided that our Office would write a letter to Dr. A asking him to examine the complainant and two other complainants in this regard.

Both our position and the Board's were put to Dr. A and his considered opinion on the following was sought:

> Are Mr. [ ], [the complainant] and Mr. [ ] with their bilateral hearing losses apt to be as handicapped or more so than a person with normal hearing in one ear and a traumatic hearing loss of 30 dB plus (but less than 35 dB) in the other?

Dr. A responded by way of a letter dated November 14, 1983. He responded to the question as follows:

> In general terms, the person with a 35/25 dB hearing loss is the more handicapped. If you note the Board's tables, they give a significant weighting to the better ear and a better ear of 25 dB loss is handicapping whereas a better ear of 0 dB loss is not. When the two ears are compounded together, the 25 dB loss in the better ear dominates the handicap rating. Therefore, I believe that all three claimants are more handicapped than your hypothetical person.

This response along with our original letter was forwarded to the Board for its consideration.

The Assistant Secretary of the Board notified my investigator in December of 1983 that Drs. E and F had certain representations they wished to make, but because of their technical nature, felt that the purpose could be best served during a meeting, preferably under the auspices of the new Ombudsman. Accordingly, a meeting was scheduled for March 22, 1984, with Dr. E, Dr. F, the Vice Chairman of Appeals, and the Assistant Secretary from the Board, and the Assistant Director, a counsel and the investigator from my Office.

During the meeting, Drs. E and F basically expanded upon their major points from the September meeting. That is, Dr. E gave detailed explanations for accepting audiological results from a large metropolitan hospital (where Drs. A and D practice) over any others. Despite Dr. A's opinion, the Board continued to hold that traumatic hearing loss of 30+ dB in one ear would be more serious than bilateral hearing loss of approximately 35/25 dB and, again, stated that we did not have the medical expertise to make a decision in this matter.

I have reviewed all the information on file, considered the extensive research carried out by my staff and carefully noted the Board's representations.

In respect to the Board's position that audiological tests from one large metropolitan hospital should take precedence over all others, I am, as a general rule, persuaded that this is not an unreasonable

position. The clinical setting and equipment at this hospital are acknowledged to be of the highest caliber. Audiologists at this hospital have tested over 6,500 Workers' Compensation Board hearing loss cases in the last 11 years; their work is exhaustive and complete. The Board does not have its own medical personnel to carry out hearing loss assessments as it does for other disabilities. It seems only reasonable that the Board should seek and depend on expert testing for the purposes of pension assessment. Thus, I am not prepared to conclude that the Board was unreasonable to accept Dr. A's results over those of Drs. J and H when assessing the extent of the complainant's hearing loss.

The last area of contention involves the Board's policy of allowing a 1% pension for a traumatic hearing loss of 30 dB plus in one ear and no hearing loss in the other, while not allowing a pension for noise-induced bilateral hearing loss of 35 dB plus in one ear but under 35 dB in the other. The Board has argued that these are two different clinical entities and that traumatic loss takes much more adaptation than gradual hearing loss.

I have seen no medical evidence to support this position in any of the medical texts researched. Dr. A's letter makes very clear that, in general, the traumatic hearing loss would not be as handicapping at this minimal level as would the bilateral noise-induced hearing loss. The Board has presented no information to substantiate its position and I can only be persuaded by the evidence available. I therefore conclude that the Board has unreasonably denied the complainant a pension as his hearing loss is beyond that which would make him eligible for a hearing-loss pension were he to be suffering from a traumatic hearing loss.

Lastly, I think it only appropriate to comment on my regret that the investigation of this case could not have been completed earlier. Essentially, the Board's position has not changed from its meeting with my staff in September of 1983. Yet, at that time, the Board representatives gave my staff to understand that were Dr. A's opinion to support the bilateral hearing loss question, then the Board would be significantly influenced and reconsider its position. However, it was apparent from the March meeting that, despite Dr. A's statements, the Board had not changed its position. While I do not question the Board's right to maintain a different position from that of my Office, I would prefer that the Board be candid about such differences and not hold out the possibility of reconciliation if none exists.

Accordingly, it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board's decision of October 5, 1981 was unreasonable in denying the complainant a pension for his hearing loss. It is, therefore, my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Workers' Compensation Board should revoke its decision of the aforementioned date and award the complainant a pension for his occupational hearing loss.

I forwarded this report to the Chairman of the Board on August 22, 1984. On November 1, 1984, he wrote that the Board would be conducting an exhaustive review of its policy on hearing loss claims, the conclusions of which he would make known to me. Because of the review to be undertaken, the Chairman thought it would be premature to respond to individual recommendations. In a follow-up letter of February 4, 1985, I was informed that the review would not be finished until June 1985. Because I did not feel this complainant should be further prejudiced by having to attend the outcome of a general policy review, I sent a copy of my report to the Premier on March 7, 1985. The complainant was advised of the results of my investigation and the file was closed.

DETAILED SUMMARY NO. 12

The complaint against an Appeal Board decision of the Workers' Compensation Board dated October 21, 1981 was registered with this Office through correspondence received November 19, 1981.

On December 17, 1981, a letter was sent by our Office to the Chairman of the Workers' Compensation Board, in accordance with the requirements of the Ombudsman Act, advising him of our intention to investigate this complaint. In our letter, the complaint was summarized as follows:

> That the Appeal Board in its decision dated October 21, 1981 was unreasonable to conclude that his employment-related hearing loss was insufficient in terms of a clinical rating, as it pertains to the Ontario Rating Schedule, to warrant a permanent partial disability award. The complainant feels his hearing loss comes within these requirements and that he should receive a permanent partial disability award.

We also asked the Chairman whether he was prepared to give a statement of the Board's position on the complaint. The Vice-Chairman of Appeals, in his letter dated January 6, 1982, indicated that since the complaint filed with the Ombudsman and the issue dealt with by the Appeal Board appeared to be the same, he did not wish to make a statement at that time.

The file was subsequently assigned to a member of my investigative staff for investigation. During her investigation, the investigator conducted a thorough review of the complainant's Workers' Compensation Board claim file supplied by the Board; also considered were the relevant legislation, policy and practices of the Workers' Compensation Board in relation to the issue.

The Ontario Rating Schedule specifies that a pension will be allocated starting at a 35 dB bilateral hearing loss. The same schedule states that a 1% pension is given for a 30+ dB loss in one ear. Board officials have explained that this latter provision applies to traumatic hearing loss only. Lastly the schedule notes that where the worker is over 60 years of age, the compensable hearing loss is arrived at by deducting from the actual hearing loss .5 dB for each year over 60 years of age.

Audiologists from McMaster University Medical Centre and the Canadian Hearing Society were interviewed. The Senior Pensions Medical Examiner for the Canadian Pensions Commission at Sunnybrook Hospital was interviewed on August 20, 1982 and Dr. A, otolaryngologist in chief at a large metropolitan hospital, was seen on November 4, 1982. At that time, copies of his monographs on hearing loss were obtained. Seminars on noise given by the Canadian Acoustical Association were attended by my investigator in the fall of 1982. The complainant was contacted for his comments as well.

The information obtained by my Office has revealed that the complainant worked for the accident employer for approximately 30 years as a locomotive engineer. He voluntarily retired at the age of 60 in 1973; he has since explained that his early retirement resulted from his hearing difficulties at that time.

The complainant was seen by Dr. B, otolaryngologist, on July 21, 1977. At that time, a hearing loss of 45 decibels in the right ear and 35 decibels in the left ear was recorded; this hearing loss Dr. B felt was due to a combination of acoustic trauma and presbycusis, with by far the major portion of the hearing loss resulting from acoustic trauma.

On May 22, 1980, the complainant was seen in consultation by otolaryngologist Dr. C; a hearing loss of 40 dB in the right ear and 35 dB in the left was noted. Accordingly, on May 25, 1980, the complainant registered a claim with the Workers' Compensation Board.

In a letter dated November 13, 1980, the Claims Review Branch denied the complainant's claim on the grounds that inquiries had established that he had not been exposed to noise levels in excess of the accepted criteria to cause hearing loss.

However, an Appeals Adjudicator decision dated April 7, 1981, found that the complainant was a credible witness and had had sufficient exposure to high level noise intensity during the course of his employment to cause hearing impairment.

The complainant saw Dr. C again on May 13, 1981, at which time similar findings to the original examination of a year prior were

recorded. On June 12, 1981, the complainant returned to Dr. B, whose report of the same date stated: "His pure tone Audiogram clearly indicates acoustic trauma and there is essentially no change from his 1977 Audiogram which means there has been very little presbycusis effect."

The accident employer appealed the decision of the Appeals Adjudicator; following the hearing held on June 26, 1981, the Appeal Board made arrangements for the complainant to be seen by otolaryngologist Dr. A, who saw him on July 30, 1981. The audiogram taken at that time revealed a 40 dB loss in the right ear and a 30 dB loss in the left. Dr. A stated in his report that he thought the hearing loss was wholly due to noise exposure. Nevertheless, when the Medical Branch made its calculations it deducted 3.5 for the complainant's age, which was 67 at that time, and came up with a hearing loss of 35 dB in the right ear and 25 dB in the left. Consequently, in its decision dated October 21, 1981, the Appeal Board concluded that the complainant's hearing loss was noise-induced, but that it was not sufficient to warrant a permanent disability award.

During the course of this investigation, the Ombudsman formed the view that it might be open to him to make a report that would justify a possible conclusion and recommendation pursuant to section 22 of the Ombudsman Act. In a letter dated July 28, 1983, written pursuant to section 19(3) of the Ombudsman Act, he advised the Chairman of this possible conclusion and recommendation:

> Possible Conclusion
>
> It would appear that it may be open to me to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of October 21, 1981 was unreasonable to deny the complainant's request for a pension for his hearing loss. In support of this conclusion, I note the following points and arguments. There is an essential divergence of medical opinion in this case. Four audiometric tests, taken by two different specialists on July 21, 1977; May 22, 1980; May 13, 1981; and June 12, 1981 all revealed a pensionable loss of hearing. The Board accepted the only test result which did not show a pensionable hearing loss. Without in any manner disputing the qualifications of Dr. A, who is an acknowledged authority, I would point out that the preponderance of medical evidence clearly supports entitlement to a pension. Moreover, there is no evidence that Drs. C and B are not equally qualified specialists whose findings, collectively, should be given more weight than Dr. A's single report.
>
> Also, I would question in this particular instance, the Board's deducting points for presbycusis when calculating the hearing

loss. Dr. B in his report of June 19, 1981 clearly stated that there had been no presbycusis effects since the 1977 audiogram, and Dr. A, in his report which the Board otherwise accepted, opined that the hearing loss was wholly due to noise exposure. Thus, I am tentatively of the opinion that the presbycusis deduction was unreasonably applied in this case, as the medical evidence clearly does not support such a practice in the case of the complainant.

I would also like to address the issue that, even by Dr. A's calculations alone, the complainant has at least a 35 dB loss in one ear. The Ontario Rating Schedule states that, for partial loss - one ear only - a 1% pension shall be allocated for a 30 dB plus hearing loss. The Board has stated, in earlier discussions with our Office, that this policy applies to traumatic loss only; nevertheless, it is accepted that the complainant has more of a hearing loss than that which would be eligible for a pension under the policy presumably only applying to traumatic loss. It would appear to me that it is unreasonable for Board policy, in principle, to allow entitlement to a person with a 30 dB loss in one ear and none in the other, while it denies the complainant a pension when he has, by the very lowest reckoning, a 35 dB loss in one ear and a 30 dB loss in the other.

Because I am of the opinion that regardless of work-related hearing loss origin - traumatic or noise-induced - the resultant handicap should be compensated in an equitable and consistent fashion and, since the clear majority of medical evidence was not accepted, I am of the tentative view that the Board's denial of the complainant's request for a pension was unreasonable.

Possible Recommendation

It would appear that it may be open to me to recommend, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision of October 21, 1981 and award the complainant a pension for his hearing loss.

The Board and the accident employer were notified of the Ombudsman's possible conclusion and recommendation and given the opportunity to make representations.

A letter was received from the accident employer on August 5, 1983, stating that at the Appeal Board hearing, its representative had maintained that the complainant's hearing loss did not arise out of his employment with the employer. As the employer was still of that opinion,

it requested that our Office investigate the Appeal Board's decision to allow the complainant entitlement for noise exposure resulting from his employment. Accordingly, a file was opened and the Workers' Compensation Board was notified of our intention to investigate. The Temporary Ombudsman, issued a report dated November 29, 1983, the substance of which dealt with the employer's representations that other facts had caused the complainant's hearing loss. The investigator assigned to the case discovered that reports carried out by Labour Canada had revealed decibel readings much in excess of 90 dB on similar locomotives operated by another railroad. Our investigation also found that although the complainant did hunt during his holidays, he was not sufficiently exposed to high levels of noise to account for his hearing loss. Accordingly, the Temporary Ombudsman found that the Appeal Board's decision to grant entitlement to the complainant for an occupational hearing loss was not unreasonable.

The Workers' Compensation Board did not respond by letter; instead, a meeting was set up between Dr. E, Hearing Loss Claims, Dr. F, Director of the Medical Branch, and the Assistant Secretary of the Board, with an Assistant Director and the investigator, of my Office. This took place on September 30, 1983, at which time the Board made the following points.

(1) The Board felt that as Dr. A was a pre-eminent specialist with the finely calibrated equipment of a large metropolitan hospital at his disposal, his or Dr. D's assessment of hearing loss should be accepted over all others.

(2) Dr. E stated that presbycusis was consistent in its effect and that as one aged, one would necessarily be affected by it and therefore the Board's policy to consider this in its calculations was appropriate.

(3) With regard to the matter of the pension for partial hearing loss of 30+ dB in one ear resulting from trauma, but nothing if the hearing loss was noise-induced and bilateral as long as the loss in both ears did not exceed 35 dB, the Board's position was that we did not have the medical expertise necessary to arrive at this opinion. Dr. E stated that there was a different kind of damage that could happen in the case of trauma, and that adjustment would be more difficult for the person with a traumatic hearing loss.

The investigator told the Board representatives that she had done extensive research and interviewing on this subject; none of the audiologists with whom she had talked had shared the Board's opinion, nor had Dr. A. Both Dr. F and Dr. E were of the opinion that if Dr. A were to say that a person with a bilateral loss of 30 dB would be more handicapped than a person with traumatic hearing loss of over 30 dB in one

ear, then the Board would reconsider its position. Accordingly, it was decided that our Office would write a letter to Dr. A asking him to examine the complainant and two other complainants in this regard.

Both our position and the Board's were put to Dr. A and his considered opinion on the following was sought:

> Are Mr. [ ], Mr. [ ] and [the complainant] with their bilateral hearing losses apt to be as handicapped or more so than a person with normal hearing in one ear and a traumatic hearing loss of 30 dB plus (but less than 35 dB) in the other?

Another matter discussed in the letter was the deduction for presbycusis in the complainant's case. We asked Dr. A whether he thought it was possible or probable that the complainant would not suffer a decline in hearing due to aging over a four-year period.

Dr. A responded by way of a letter dated November 14, 1983. He responded to the first question as follows:

> In general terms, the person with a 35/25 dB hearing loss is the more handicapped. If you note the Board's tables, they give a significant weighting to the better ear and a better ear of 25 dB loss is handicapping whereas a better ear of 0 dB loss is not. When the two ears are compounded together, the 25 dB loss in the better ear dominates the handicap rating. Therefore, I believe that all three claimants are more handicapped than your hypothetical person.

Dr. A also discussed the question of presbycusis deduction at some length:

> Your question of presbycusis is a further contentious issue. The Board's removal of .5 dB for every year above the age of 60 is a significant improvement over their previous practice of removing .5 dB for every year above the age of 50. Nevertheless, it gives only a crude approximation to specific presbycusis corrections, the interpretation of which is always confounded by socioacusis, i.e. that hearing loss produced by living in a generally noisy environment apart from work.
>
> I have frequently argued that there should not be a correction for presbycusis and, in particular, do not feel that presbycusis affects the frequencies 2kHz and below to a significant degree at the age of 60. Even at 3 kHz I have some difficulty in accepting that a person with otherwise normal hearing suffering only from presbycusis would not be handicapped while a similar person with an additional hearing loss from noise is handicapped, the difference surely being the noise exposure.

> ... However, in general terms, presbycusis does not affect all people equally. The tables which you provided are population norms. There are differences in this aspect of aging as in any other - some people are 70 years old, some are 70 years young, some have 70-year-old ears, some have 70-year-young ears.
>
> It is possible that the complainant suffered no decline in hearing over a 4 year period from aging although at his age, it is not probable. By this I mean it is likely that he suffered some loss of hearing from age alone in a 4 year period between the ages of 63 and 67.

This response along with our original letter was forwarded to the Board for its consideration.

The Assistant Secretary of the Board notified my investigator in December of 1983 that Drs. E and F had certain representations they wished to make, but because of their technical nature, felt that the purpose could be best served during a meeting, preferably under the auspices of the new Ombudsman. Accordingly, a meeting was scheduled for March 22, 1984, with Dr. E, Dr. F, the Vice Chairman of Appeals, and the Assistant Secretary from the Board, and the Assistant Director, a counsel and the investigator from my Office.

During the meeting, Drs. E and F basically expanded upon their major points from the September meeting. That is, Dr. E gave detailed explanations for accepting audiological results from one large metropolitan hospital (where Drs. A and D practice) over any others. Dr. E also maintained her position that presbycusis affected everyone and referred our Office to research by two doctors who have written extensively on hearing loss and presbycusis deduction. Despite Dr. A's opinion, the Board continued to hold that traumatic hearing loss of 30+ dB in one ear would be more serious than bilateral hearing loss of approximately 35/25 dB and, again, stated that we did not have the medical expertise to make a decision in this matter.

I have reviewed all the information on file, considered the extensive research carried out by my staff and carefully noted the Board's representations.

In respect to the Board's position that audiological tests from a large metropolitan hospital should take precedence over all others, I am, as a general rule, persuaded that this is not an unreasonable position. The clinical setting and equipment at this hospital are acknowledged to be of the highest caliber. Audiologists at this hospital have tested over 6,500 Workers' Compensation Board hearing loss cases in the last 11 years; their work is exhaustive and complete. The Board does not have its own medical personnel to carry out hearing loss assessments as

it does for other disabilities. It seems only reasonable that the Board should seek and depend on expert testing for the purposes of pension assessment. Thus, I am not prepared to conclude that the Board was unreasonable to accept Dr. A's results over those of Drs. C and B when assessing the extent of the complainant's hearing loss.

In respect to deduction for presbycusis, I have reviewed the audiological studies by various authorities and it is apparent that no clear consensus exists. While I am impressed by Dr. A's reasoning, I cannot conclude that a compelling argument based solely on medical opinion against the general policy for presbycusis deductions exists. However, I am perturbed by the Board's decision to let general policy override specific evidence as presented in the complainant's case. In one article (supplied to my Office by the Board), the doctor states that "although not all older people are hard of hearing, losses can vary from zero to total deafness." The article concludes by stating that the degenerative processes of presbycusis vary greatly from one person to another. Thus, the .5 deduction for every year over 60 might, as Dr. F argued, be a comparatively generous reflection of the general deteriorating effects in older people. Nevertheless, given Dr. B's categorical statement that no additional hearing loss from presbycusis was present between 1977 and 1981 and taking into account that presbycusis does not affect everyone equally, I am of the opinion that in this case, the Board unreasonably fettered its discretion. That is, it stood by the general policy on presbycusis deduction even though the specific medical evidence concerning the complainant indicated that there was not additional loss. The Board's right to formulate policies is unquestioned; however, no policy should supersede the particular evidence in an individual case. Compensation is due the individual as he or she is uniquely affected, given the evidence available.

The last area of contention involves the Board's policy of allowing a 1% pension for a traumatic hearing loss of 30 dB plus in one ear and no hearing loss in the other, while not allowing a pension for noise-induced bilateral hearing loss of 35 dB plus in one ear but under 35 dB in the other. The Board has argued that these are two different clinical entities and that traumatic loss takes much more adaptation than gradual hearing loss.

I have seen no medical evidence to support this position in any of the medical texts researched. Dr. A's letter makes very clear that, in general, the traumatic hearing loss would not be as handicapping at this minimal level as would the bilateral noise-induced hearing loss. The Board has presented no information to substantiate its position and I can only be persuaded by the evidence available. I therefore conclude that the Board has unreasonably denied the complainant a pension as his hearing loss is beyond that which would make him eligible for a hearing-loss pension were he to be suffering from a traumatic hearing loss.

Lastly, I think it only appropriate to comment on my regret that the investigation of this case could not have been completed earlier. Essentially, the Board's position has not changed from its meeting with my staff in September of 1983. Yet, at that time, the Board representatives gave my staff to understand that were Dr. A's opinion to support the bilateral hearing loss question, then the Board would be significantly influenced and reconsider its position. However, it was apparent from the March meeting that, despite Dr. A's statements, the Board had not changed its position. While I do not question the Board's right to maintain a different position from that of my Office, I would prefer that the Board be candid about such differences and not hold out the possibility of reconciliation if none exists.

Accordingly, it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board's decision of October 21, 1981 was unreasonable in denying the complainant a pension for his hearing loss. It is, therefore, my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Workers' Compensation Board should revoke its decision of the aforementioned date and award the complainant a pension for his occupational hearing loss. I also recommend that the presbycusis deduction should not be included when calculating the hearing loss.

I forwarded this report to the Chairman of the Board on August 22, 1984. On November 1, 1984, he wrote that the Board would be conducting an exhaustive review of its policy on hearing loss claims, the conclusions of which he would make known to me. Because of the review to be undertaken, the Chairman thought it would be premature to respond to individual recommendations. In a follow-up letter of February 4, 1985, I was informed that the review would not be finished until June 1985. Because I did not feel this complainant should be further prejudiced by having to attend the outcome of a general policy review, I sent a copy of my report to the Premier on March 7, 1985. The complainant was advised of the results of my investigation and the file was closed.

DETAILED SUMMARY NO. 13

This complaint against the Workers' Compensation Board was brought to the attention of this Office by a letter received on July 15, 1982 from the President of the Disabled Workers of Ontario. On behalf of the complainant, the President contended that the Appeal Board was unreasonable to deny the complainant entitlement to benefits for disabilities arising from various amputations on the basis of aggravation of Buerger's Disease which occurred in the course of his employment. In a decision dated November 20, 1981, the Appeal Board found that the complainant's disabilities were not causally related to his employment or to industrial accidents.

On August 12, 1982, the Chairman of the Workers' Compensation Board was notified of our intention to investigate the complaint, in accordance with the requirements of the Ombudsman Act. The Chairman was invited to make a statement, if he wished, of the Board's position in relation to the complaint. On behalf of the Chairman, a reply was received from the Assistant Secretary, stating that the Board did not wish to make a statement at that time. Following receipt of the letter, this complaint was assigned to a member of my investigative staff. During her investigation, the investigator conducted a thorough review of the complainant's Workers' Compensation Board claim file supplied by the Board, and carefully considered the relevant legislation, policy and practices of the Workers' Compensation Board in relation to the issue.

The original investigator subsequently left our Office and the complaint was then reassigned to another member of our investigative staff.

Our investigation has revealed that the complainant was employed as a carpenter by the first accident employer in 1964. On December 3, while being transported from one job site to another in an open truck, the complainant suffered frostbite to the toes of his right foot. On December 14, 1964, the complainant was assessed at a metropolitan hospital by Dr. A, who diagnosed "bilateral endarteritis obliterans" (Buerger's disease) and stated, "It is my opinion that this man has a disability which has been aggravated by previous pathology". The complainant's claim for Workers' Compensation Benefits was allowed on an aggravation basis only and he received temporary total disability benefits from December 24, 1964 to March 19, 1965.

Between 1964 and 1969, the complainant received benefits for two other incidents - one for medical aid only and one for a back injury. Neither injury involved an aggravation of Buerger's disease.

On October 21, 1969, while employed by another employer as a labourer, the complainant cut his left ring finger with a piece of metal. His finger subsequently became infected.

On October 24, 1969, three days after receiving the injury to his left ring finger, the complainant was working on a machine when the machine overflowed, soaking both his feet and his shoes in water. In a statement to the Board reported in Board memo number 31, the complainant said he was "constantly standing in this water which was always half an inch deep.... He was required to stand in this water most of the working day, as it was his job to mop up the water". At the end of his shift on October 24, he changed his socks but his feet felt hot and humid. The following day the complainant noticed a sore feeling around the little toe of his right foot. The complainant reported that he first consulted his family physician, Dr. B, on October 28, 1969 and continued to see Dr. B for three months for both his foot and his finger. In his report dated

November 6, 1970, Dr. B confirms that the complainant was treated for both his hand and foot conditions during October and November of 1969 and he lists twelve dates in those months on which the complainant was seen in his office.

The Workers' Compensation Board investigated the complainant's claim. Mr. J reported in November, 1970 that the foreman, plant Manager, and a co-worker confirmed that there was overflow from the machine. The Plant Manager stated that the overflow was alkaline soapy water. One co-worker, Mr. G, was quoted by the investigator as follows:

> ... on one occasion when the water overflowed from the machine, [the complainant's] shoes and feet got wet. The water got into his shoes. [the complainant] had complained to him [Mr. G] that his foot was sore and he [Mr. G] believes that it was in the small toe area.

The complainant was admitted to a metropolitan hospital on February 25, 1970 and was treated for both his finger and foot problems. He was discharged one month later but his condition worsened and finally the distal phalanx of his left ring finger was amputated on June 3, 1970. Dr. C, a plastic surgeon, diagnosed "chronic fungus osteomyelitis". The wound did not heal properly, and the complainant returned to the hospital with a "dreadful wound infection" requiring further amputation. As well, his right fifth toe condition worsened. In a medical report dated August 28, 1970, Dr. D, an orthopaedic surgeon, noted:

> This 39 year old man apparently scratched his toe at work although I could not get any clear details. He states he was working in some water and he thinks he injured his toe inside his shoe in some way.... He tells me that when he went to his place of work to try and get them to give him papers for compensation, he was laid off immediately and therefore has been unable to submit a claim to the Workmen's Compensation Board.
>
> ... on examination he has an obvious discharge from the medial aspect of the fifth toe and pain with any movement.... X-rays revealed a lytic area in the proximal phalanx right into the joint. In fact, this looks look like an osteomyelitis.

Dr. D performed an amputation of the proximal phalanx of the right fifth toe at a metropolitan hospital on September 9, 1970. Following the operation, Dr. E of the department of radiology at another hospital reported:

> A.P., oblique and lateral views were made of the right fifth toe. Erosion of the head of [the] proximal phalanx is noted. Some subluxation of the proximal and mid phalanges is also seen. Very likely the above mentioned finding is traumatic in nature.

Again, the wound failed to heal and a further amputation was performed by Dr. D on October 14, 1970.

The Workers' Compensation Board denied entitlement for both the finger and foot claims initially. In a letter to the complainant dated November 30, 1970, a Claims Officer noted that "... it has not been shown that the disability was the result of an accident in the employment... and it has not been shown that the disabilities for which you were treated were the result of the incidents that you have described". The Claims Officer stated that the Board's investigation failed to disclose any supervisors or fellow workers who could confirm the history related by the complainant, nor could the employer confirm his story about the events of October 24, 1969. The Claims Review Committee decided in January, 1971 that entitlement to benefits was not established for the finger or the foot.

An Appeal Tribunal hearing held March 19, 1971 dealt only with the issue of entitlement for the left ring finger and granted the complainant's appeal. The tribunal found that "the injury to the complainant's left ring finger was caused by [an] accident arising out of and in the course of employment on October 21, 1969". The tribunal noted that, "The reporting to and witnessing of the accident was confirmed by the foreman, who was present at the hearing. The foreman also said that the workman had complained of burning his right foot with an alkali solution about the same time".

The complainant received benefits for laceration, osteomyelitis, and the amputation of the finger from October 28, 1969 to August 1, 1970. In September, 1972 he was awarded a permanent disability pension of 2.4% for the amputation and received a lump sum payment of $1,925.

A second Appeal Tribunal hearing was held September 15, 1971 with respect to the issue of entitlement for the complainant's right foot disability. The Appeal Tribunal noted that although the infection was first noticed a couple of days after the water episode, there was nothing to show that this infection was either caused or aggravated by the water. The Tribunal denied the appeal since it was not satisfied that the complainant's disability was in any way work-induced.

After undergoing several other amputations, the complainant again applied to the Workers' Compensation Board in 1978 for benefits,

including benefits for his right fifth toe amputation. The matter was referred to Dr. H, the Board's Surgical consultant, who noted in a memo dated July 16, 1979 as follows:

> I have reviewed all the information on this man's four files... it establishes beyond a doubt in my mind that this man suffers from a condition known as Buerger's disease which is a progressive problem of unknown causation leading to obliteration of the arterial supply in the four limbs. This condition is not a compensable matter at all.

In a medical report dated December 4, 1978, Dr. B, who had treated the complainant since the frostbite incident in 1964, reported to the complainant's lawyer as follows:

> ... the complainant suffers from Buerger's disease or what is called arteriosclerosis obliterans. The exact cause of this disease is not known but it is certain that exposure to cold and damp weather markedly aggravates its symptoms and signs. It involves mainly the limbs especially the peripheral parts of them and there is an ongoing obliterative thrombotic inflammatory process of non-infectious origin going on involving mainly the smaller arteries as well as the veins at times.... his condition at least if not created by his employment was markedly aggravated by it and brought into surface by his type of work as I described above.

The Appeal Board decision dated November 20, 1981 denied the complainant's claim for entitlement for further amputations to his left leg and right and left hands as well as the amputation of his right fifth toe. With regard to the right fifth toe, the Board noted that "evidence does not establish that the work activities and exposure on October 24, 1969 initiated or aggravated the underlying disease".

When the complainant contacted our Office in July 1982, we wrote to Dr. F, a leading authority on Buerger's disease, and asked for his opinion of the medical information on file. He stated on April 13, 1983 that:

> ... The etiology of Buerger's disease seems to be related to smoking, familial history and other chemical factors that we may or may not understand. These chemical factors could be working at his plant although I am not aware of any specific factors that would cause this problem.
>
> Any cut or scratch on an extremity which is involved with Buerger's disease can and will lead to a lack of healing of these sores and eventual necessity for care. Very often

> procedures to improve blood supply into the area do not improve the situation and the patient eventually goes on to local amputations.
>
> Clearly cold does aggravate Buerger's disease. Clearly a cut or scrape on an extremity that is known to have Buerger's disease will get worse....

Our Office then narrowed the issue to the question of compensation for the complainant's right fifth toe. We wrote again to Dr. F, outlining the events of October 24, 1969. His reply, dated November 7, 1983 stated:

> Certainly the wet water and chemical irritants in the water could cause problems, but most likely this man had wet shoes and his toes would rub in the shoes and because of the softening of the shoe he would develop an ulcer.... If... he was not knowledgeable and he did not know how to protect himself against injury and did not understand that he [sic] was a potential for severe damage to his feet, then I would agree with you that he himself did have an amputation subsequent to working conditions.... However, [the] events which you describe obviously did lead to this man's problem.

We forwarded Dr. F's second report to the Board and Dr. H was asked by the Appeal Board to review the file in order to give his opinion on compensation. Although he noted Dr. B's letter of November 6, 1970 indicating that the complainant was treated for his right fifth toe problem in October and November 1969, Dr. H concluded that:

> In the absence of any documentation dated between late October of 1969 and February of 1970 concerning the toe and its stated causation, I feel that the claimed association is wholly speculative.

Dr. H concluded that the two primary causes for the amputation of the toe were "firstly the significant impairment of blood supply due to the Buerger's disease and secondly the problem in the interdigital cleft between the 4th and the 5th toe defined above which under circumstances of decreased vascularity tends to progress and become significant". He concluded that the lack of medical evidence between October, 1969 and February, 1970 and "... the undoubted fact that the causation of his toe problem is very adequately explained by other pathology, I cannot recommend that the Appeal Board reconsider their decision".

On the basis of the information available, I set out the following tentative conclusion and recommendation in my letter to the

Workers' Compensation Board dated August 1, 1984, written pursuant to section 19(3) of the Ombudsman Act:

Possible Conclusion:

The Appeal Board unreasonably denied entitlement for the injury to the complainant's right fifth toe. [Reference: Ombudsman Act, section 22(1)(b)]

Possible Recommendation:

The Appeal Board should vary its decision and award the complainant benefits in accordance with its policy on non-measurable pre-existing conditions. [Reference: Ombudsman Act, section 22(3)(c) and (g)]

This possible conclusion and recommendation were based on the above information and on the following concerns:

A. Medical Evidence:

The medical evidence indicates that, prior to 1964, the Buerger's disease was asymptomatic. Following the frostbite incident on December 3, 1964, the complainant's disease manifested itself and was diagnosed. There were no other manifestations until 1969, when the complainant cut his left ring finger and suffered an ulcer between his toes as a result of wet feet.

The medical evidence indicates that the complainant saw his family doctor, Dr. B, frequently during October and November of 1969 and that Dr. B treated him for both his finger and his foot problems. Dr. D's report of August, 1970, confirms that the complainant related his foot injury to the water incident.

Dr. F gave as his opinion that although Buerger's disease is not caused by any particular occupation, it is aggravated by symptoms of cold and wet and by chemical trauma. The disease is episodic and Dr. F notes that a cut or scratch to an extremity could very likely result in amputation. The complainant was exposed to alkaline soapy water which overflowed from the machines, which could possibly result in chemical trauma to someone with Buerger's disease who is sensitized. The complainant was not wearing protective equipment; no prophylactic measures were used, nor was the complainant instructed to use them. Dr. F, in his second report, states that in those circumstances, he would agree that the complainant did have an amputation subsequent to working conditions.

The Appeal Board relied on the opinion of its surgical consultant, Dr. H, who felt that Buerger's disease is a progressive vascular problem, and therefore any disability suffered by the complainant was as a result of the slow progression of his disease combined with other pathology. It is difficult to understand why the Board granted the complainant entitlement for his finger disability but not for his foot disability when, in each case, Buerger's disease was the underlying problem and the diagnosis in each case was osteomyelitis.

B. Disability Arising Out of Employment:

The Appeal Board found that the complainant's work activities and exposure on October 24, 1969 did not aggravate his underlying disease. However, there was evidence from the complainant's foreman and a co-worker which confirmed that there was overflow of water from the machines, that the complainant's job involved cleaning up this overflow, that the overflow was an alkaline soapy water, and that it was possible for the complainant's feet to become wet. The foreman testified before the Appeal Tribunal that he did recall the complainant complaining of burning his right foot with an alkali solution about the time he received his finger injury and the co-worker, Mr. G, confirmed that there was one occasion when the complainant's feet became wet. Dr. F's second medical report indicates that an alkaline soapy water could provide the chemical trauma necessary to aggravate Buerger's disease. The existence of Buerger's disease means that a very minor injury to an extremity will lead to serious complications, including local amputation. This is the course the complainant's injury followed. As well, the complainant's finger injury is an indication of the type of reaction common to Buerger's disease, and the Appeal Board compensated him for that injury.

C. Board Policy:

The Board's policy on non-measurable pre-existing conditions indicates that an injured employee's entitlement would not be reduced due to any pre-existing condition provided the condition is shown not to have been disabling prior to the compensable injury. There is no evidence that the complainant's pre-existing disease disabled him prior to the injury in 1969 with the exception of the 1964 frostbite incident, when the disease was first diagnosed. He returned to work and he worked steadily until 1969.

On the basis of the evidence, the complainant may be entitled to benefits on an aggravation basis and that he may be entitled to the total assessment because his pre-accident disability was minor and not disabling.

The Chairman responded to the possible conclusion and recommendation in a letter dated September 28, 1984 in which he wrote that:

> The issue in this case appears to be whether or not an incident on October 24, 1969 could have led to the eventual amputation of the complainant's right fifth toe. The panel understands your position in the matter to be, tentatively, that the report of Dr. F provides a medical basis upon which the panel should have found that the underlying non-compensable Buerger's disease was aggravated by the events on October 24, 1969 and that the subsequent amputation was therefore compensable.
>
> Careful examination of Dr. F's report of November 7, 1983 reveals the following:
>
> 1. In response to the question "is it likely the complainant's condition (diagnosed in 1964 as Buerger's disease) was aggravated by the incident of October 24, 1969?", Dr. F replies:
>
>> "Certainly the wet water and chemical irritants in the water could cause problems, but most likely this man had wet shoes and his toes would rub in the shoes and because of the softening of the shoe he would develop an ulcer". (emphasis added)
>
> First of all, the doctor's use of the word "could", rather than "likely" or "probable", suggests to the Appeal Board that he concedes only the possibility that wet water and chemical irritants would have caused the subsequent problems. Secondly, the evidence implies that it was not unusual for the complainant to have wet feet, in that he was always standing in approximately one-half inch of water. Thirdly, the Appeal Board did not accept, as Dr. F appears to have done, that the softening of the shoe would have caused an increase in friction. If anything, the opposite is likely to occur. Lastly, Dr. F's opinion appears based on the premise that the complainant developed an ulcer at that time. There is no evidence to support this in fact.

2. While Dr. F appears to be unequivocal when he states that "the events which you describe obviously did lead to this man's problem", he seems equally unequivocal in his report of April 14, 1983 when he states:

> "in the first instance I would like to state that Buerger's Disease has no relationship to this patient's problem with working injuries".

3. The question of whether the alkali in the water was present to a degree sufficient to create an irritant effect, has never been established.

For the above reasons, the Appeal Board could not agree that the information submitted by Dr. F was conclusive, or that it should be preferred over the evidence of Dr. H.

In respect of the points made under the heading "Disability Arising Out of Employment" on Page 7 of your letter, it is interesting that the co-worker could confirm that there was "one occasion when the complainant's feet became wet", as opposed to the suggestion in your letter that his feet were constantly wet. The reference to the complainant's finger injury is also of significance, in that the finger injury was actually a cut and clearly falls within the definition of "accident". The disability involving the complainant's right fifth toe hinges on the application of Section 1(1)(a)(iii) of the Act and in order to be accepted, it would have to be established that there was something about the work which was reasonable to consider had caused the disablement. In this case, the Appeal Board is of the view that one can only speculate that wet feet, or exposure to soapy water with some alkaline content would have given rise to the eventual amputation.

With respect to the comments made under "Board Policy" on Page 7 of your letter, the Appeal Board points out that this policy is applicable only after entitlement is accepted. It is not used or applied in the process of determining whether or not an injury or disability is compensable in the first place.

In considering this case, the Appeal Board was not without sympathy for the complainant's unfortunate circumstances. That the Board recognizes the impact or aggravating effect of employment incidents on his Buerger's disease is, I believe, reflected in the fact that the Board has accepted his condition

> on an aggravation basis for both the finger injury and the frostbite in 1964. Unfortunately, the disability involving the right fifth toe has not, in the Appeal Board's view, been established as a consequence of the employment in the same way as the other two claims, and under the circumstances the Appeal Board cannot agree that its decision was unreasonable.
>
> In view of all of the above, the Appeal Board will not implement your tentative recommendation.

I have now had the opportunity to consider carefully all the factors involved, including the Board's response to my letter dated August 1, 1984.

The Chairman's letter raises three points. Point 1 refers to Dr. F's report of November 7, 1983. I feel it is clear on the face of the report that Dr. F was stating his opinion that either the water or the friction from the complainant's wet shoes resulted in his condition. Both of these events occurred in the course of his employment, and resulted in the soreness that eventually led to the amputation of his toe.

Point 2 quotes from Dr. F's earlier report of April 13, 1983. I point out that that report was made before we narrowed our investigation to the question of entitlement for the amputation of the complainant's right fifth toe and before Dr. F had all the facts before him relating to that incident. This was pointed out to the Board in a letter from our Office dated November 25, 1983. Thus, Dr. F's second report is the pertinent one with regard to the toe disability.

Point 3 raises the question of the degree of alkali in the water and whether it was sufficient to create an irritant effect. I agree that the degree of alkali was not established. I point out, however, that Dr. F is the leading Canadian expert on Buerger's Disease and his response was based on information from us that "The plant manager confirmed that it was alkaline soapy water..." that soaked the complainant's feet. I, therefore, am of the opinion that the <u>degree</u> of alkali is not the determinative issue.

The Appeal Board's conclusion, as set out by the Chairman at page 2 of his letter, is that the information from Dr. F was not conclusive and should not be preferred over that of Dr. H. I point out that, not only is Dr. F an expert in this area, but he has been treating the complainant for some time and is familiar with his case. Dr. H is trained in general surgery and has not treated the complainant.

With regard to the question of entitlement for a disability arising out of employment, the Chairman notes that our earlier report suggested the complainant's feet were constantly wet. I refer to page 2,

paragraph 5 of my August 1, 1984 letter, in which the complainant is quoted as stating that he was "constantly standing in this water..." (emphasis added). The complainant wore steel-toed work boots and, although it was his job to mop up the overflow of water, his feet became wet on this one occasion only. Thus, this incident occurred while he was at work, performing the duties of his employment.

The Chairman also refers to the application of section 1(l)(a)(iii) of the Workers' Compensation Act, which states that "accident" includes disablement arising out of and in the course of employment. The Chairman states that it must be established that there was something about the work which was reasonable to consider had caused the disablement, in order for this section to be applied to the complainant. The Appeal Board feels one can only "speculate" that wet feet, or exposure to soapy water with some alkaline content, would have given rise to eventual amputation. I, however, rely on the November 7, 1983 report of Dr. F referred to earlier in the Chairman's letter, wherein Dr. F states:

> Certainly the wet water and chemical irritants in the water could cause problems ... If ... [referring to the information in our letter dated August 8, 1983] he was not knowledgeable and he did not know how to protect himself against injury and did not understand that there was a potential for severe damage to his feet, then I would agree with you that he himself did have an amputation subsequent to working conditions.... The events which you describe obviously did lead to this man's problem.

The interpretation of Board policy raised on page 3 of the Chairman's letter should be clarified. I rely on the application of the Workers' Compensation Board "Board Policies and Administrative Directives", section 108(2) Directive 1 re: Application of the policy on aggravation of pre-existing conditions, to determine entitlement for the complainant. The section states:

> The policy on aggravation of pre-existing conditions applies to both Schedule I and Schedule II claims in which:
>
> (1) a relationship is shown between an underlying condition and the degree of disability arising from the accident; and
>
> (2) The period of treatment and recuperation is prolonged due to an underlying condition; and/or
>
> (3) an increased degree of residual disability occurs over that usually found in such cases owing to the underlying condition.

I then rely on the application of the Workers' Compensation Board Claims Adjudication Branch Procedures Manual, Document 33/02/20, page 4, on Non-Measurable Prior Conditions, section a(i) to recommend that the complainant should be granted the total assessment once his entitlement is determined.

The Chairman's penultimate paragraph states that the incident involving the complainant's right fifth toe is distinguishable from the incidents of frostbite and the injury to his left ring finger for which he was compensated. I understand the Chairman's position to be that the two compensable injuries were "accidents" in that they were traumatic incidents. The injury to the complainant's right fifth toe is also an "accident" within the definition of section 1(a)(iii) of the Workers' Compensation Act, in that it is a disability arising out of his employment. In my view, the Workers' Compensation Act requires compensation equally for traumatic and for disabling "accidents". I am simply requesting that the Appeal Board decide this case in accordance with the governing Act and its own policies.

Accordingly, it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of July 24, 1980 was unreasonable to deny entitlement for the injury to the complainant's right fifth toe.

It is therefore my recommendation, pursuant to section 22(3)(c) and (g), that the Appeal Board vary its decision and grant the complainant entitlement for the disability resulting from the amputation of his right fifth toe.

This recommendation was included in a report to the Chairman dated January 11, 1985.

The Board had not responded to the report and recommendation by March 29, 1985. I therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 14

This complaint was received at this Office on February 9, 1983. The complaint was against a decision of the Appeal Board of the Workers' Compensation Board dated December 17, 1982. The complainant contended that his back disability arose out of and in the course of his employment. The Appeal Board, in its decision, concluded that the complainant's contention was unfounded.

On April 12, 1983, the Chairman of the Workers' Compensation Board was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complainant's complaint. The Chairman was invited to make a statement of the Board's position.

On April 26, 1983, the Assistant Secretary to the Board responded on the Chairman's behalf by stating that the Board did not wish to make a statement at that time.

This complaint was assigned to a member of my investigative staff who thoroughly reviewed the complainant's Workers' Compensation Board claim file supplied by the Board and considered the relevant legislation and Board policy in relation to the issue.

Our investigation revealed that the complainant experienced a sudden onset of low back pain on January 19, 1981, while performing his regular duties as a crane operator. The complainant had been a crane operator for approximately 15 years prior to January 19, 1981, and primarily worked on crane #113. The complainant advised the Board, the accident employer and our Office that the crane in question is a fairly old piece of machinery, subject to a great deal of jarring and bumping, and that the brake pedal is extremely stiff. He added that the constant operation of the brake pedal caused pain in his leg which radiated into his back.

As the basis for its denial of the complainant's claim, the Appeal Board noted and accepted that the complainant had first experienced back discomfort while gardening in the summer of 1980, some six months prior to the January 19, 1981 incident. The Appeal Board further noted that for a number of years, the complainant had operated crane #113 without any apparent difficulty. When the complainant laid off work in March 1981, he claimed sickness and accident benefits through his employer's insurance plan; it was not until May, 1981 that the complainant claimed Workers' Compensation Board benefits. The Appeal Board did not accept as plausible the complainant's explanations for this delay.

During the course of this Office's investigation, I reached the tentative conclusion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of December 17, 1982, which found that the complainant's back disability did not arise out and in the course of his employment, was unreasonable. My tentative conclusion was set out in my letter of March 23, 1984, addressed to the Chairman, and sent pursuant to section 19(3) of the Ombudsman Act. In addition, my letter was sent to the accident employer.

In my letter of March 23, 1984, I supported my tentative conclusion by pointing out that prior to January 19, 1981 the complainant

had not sought medical attention for back pain, nor had he lost time from work because of this pain. It appeared to me that the complainant's periods of back pain prior to January 19, 1981 were minor in nature, and not a sound basis upon which to deny him entitlement for a back condition subsequent to January of 1981.

I noted in support of the complainant's contention that he experienced unusual difficulty operating crane #113.

In support of the complainant's explanations that he did not make an immediate Workers' Compensation Board claim because he did not initially consider his injury serious, I pointed to the November 27, 1981 report from the complainant's general surgeon, Dr. A. In his report, Dr. A stated that on January 23, 1981 when he first saw the complainant in connection with back pain relating to the January 19, 1981 incident, he advised the complainant to seek Workers' Compensation Board benefits. The complainant, however, was optimistic that the disability would resolve itself without causing loss of work.

Dr. B, the orthopaedic surgeon treating the complainant, reported to the Workers' Compensation Board that in his opinion, the complainant's explanation was "... plausible when one considers the difficulty with which the Board claims are settled as opposed to those of the insurance claims...."

In my letter I noted that the medical opinions expressed by Drs. A and B as to the origin of the complainant's back disability indicated that it was his work on the rough-riding crane #113 that aggravated his pre-existing degenerative disc disease. I indicated that I felt the opinions of these independent specialists would seem to bear more weight than the opinion of the Workers' Compensation Board Medical Adviser, which did not support a relationship of the complainant's back disability to his work.

I concluded by stating that, "... With a diagnosis of degenerative disc disease in mind, it would appear that the complainant's disablement was an aggravation of his pre-existing degenerative disc disease, and should be allowed as such...."

I therefore tentatively recommended, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision dated December 17, 1982 and grant the complainant entitlement to compensation benefits on the basis of an aggravation of pre-existing degenerative disc disease, arising out of and in the course of his employment.

By letter of April 11, 1984, the employer's Employee Relations Assistant responded by stating, in part:

> ... It is our understanding that the Workers' Compensation Act, when amended in 1963 to include "Disablement, arising out of and in the course of employment", does not replace or interfere with the basic premise of evidence of causation rather than the mere physical presence of a worker at the work place at the time of the development or onset of pain or disablement.... It would be unreasonable to revoke the Board's decision of 1982 12 17.

The Chairman responded to my letter on June 28, 1984, and indicated that in order for an accident to be considered as disablement arising out of and in the course of employment, as outlined in section 1(1)(a)(iii) of the Workers' Compensation Act, there must be something about the work that caused the disablement to occur. The Chairman stated that the Appeal Board was not able to identify that "something". The Chairman added that the complainant and the attending physicians all had similar difficulties in relating the back problems to "something about the work".

The Chairman noted that when the complainant was contacted by a member of the Board's Adjudication staff on June 23, 1981, the complainant did not relate the cause of his back problems to a specific incident but to his work as a crane operator in general. The Chairman also noted that on the complainant's report of accident dated August 17, 1981, the complainant did not indicate a specific incident but considered that it was his work in general which caused his back pain. A further conversation with the complainant by a member of the Board's Adjudication staff in September of 1981 revealed that the complainant did not attribute his disability to a specific incident but to his employment as a crane operator over the years. The Chairman also noted that there was no mention of a stiff brake pedal as being the source of his problems during these contacts.

The Chairman then noted that Drs. A and B did not identify any specific work-related event to account for the onset of back pain and indicated that their opinions which support the relationship of the back pain to the employment were made "... well after the fact...." The Chairman's letter went on to state:

> ... With respect to Dr. A, it would hardly appear that the doctor is impartial in the matter, as indicated by the following extract from his report of November 27, 1981. In this letter Dr. A seems to take issue with a letter sent by one of the Board's staff to his former address.
>
> . . . .

> Dr. A goes on to state that "As far as I can recall he first felt pain in his lower back while actively carrying out his routine work...". Obviously, this is not correct as the complainant told both the Board's staff and Dr. B that his back problems started several months prior to the January 1981 onset. Furthermore, it seems somewhat misleading for Dr. A to say that "I first saw the complainant for his back disability on Jan. 23/81", since, according to the complainant, he saw Dr. A on that occasion because of his cardiac problem. The complaint of back pain was mentioned incidental to the primary purpose of the visit.
>
> Your letter refers to Dr. A's report of November 27, 1981 and Dr. B's report of November 8, 1982, as supporting the complainant's explanation for not claiming compensation immediately. Dr. B's comments are general, and are not attributed to anything the complainant may have said to him concerning the delay. Notwithstanding Dr. A's observations, the Appeal Board finds it difficult to accept that in March 1981, when his disability had become so severe that he could no longer work, the complainant claimed sickness and accident benefits because he did not consider his condition to be serious. That is why the Appeal Board did not consider his explanation "plausible" and the comments made by Drs. A and B do nothing to dissuade the Appeal Board from that view.

Regarding the statements of the co-workers as to the operation of crane #113, the Chairman indicated agreement with the accident employer that these co-workers were not in a position to comment on the operation of this crane or any ensuing disability as they were not familiar with this crane. The Chairman's letter concluded by stating:

> ... In any event, the Appeal Board considers the condition of the crane to be less relevant than the fact that the complainant had operated this unit for 14 years without any recorded complaint of difficulties. This being the case, it cannot be said that for the complainant, there was anything unusual about the crane in which he worked, to account for his back disability.
>
> The Appeal Board does not dispute that the complainant may have experienced back pain at work in January of 1981. Furthermore, the Appeal Board does not dispute that there may have been some mechanical or operational difficulties in crane #113. However, it requires more than the mere existence of these factors to bring a worker within the parameters of the Workers' Compensation Act. In the Appeal Board's view it has not been established that the complainant's disability arose out of and

> in the course of his employment, nor has it been established that there was anything about the work which could reasonably be considered to have caused the disablement to come on. Accordingly, the Appeal Board cannot agree that its decision of December 17, 1982 was unreasonable, and consequently, no action will be taken in terms of implementing your tentative recommendation.

I have carefully considered the submissions made by the Workers' Compensation Board and the accident employer, and in addressing myself to these submissions I would like to note the following points.

1) Entitlement Under Section 1(1)(a)(iii) of the Workers' Compensation Act

I confirm that the complainant's disability should be considered as disablement arising out of and in the course of his employment under the above-noted section of the Workers' Compensation Act, and in support of this I note Directive II of the Board Policies and Administrative Directives, which states:

> Entitlement under the amending Act applying to accidents happening on and after the 3rd of April, 1963, which includes under the definition of accident "disablement arising out of and in the course of employment" requires that the disablement which the employee suffers must have some causal relationship with the work being performed, that is, it is not sufficient that the disablement comes on during work, but rather there must be something about the work which can be considered to have caused the disablement to come on, such as strenuous work, awkward position, unaccustomed strain, or even a movement arising out of the work which is reasonable to consider has caused the disablement.

The "something" about the work to cause this disablement was the jarring and bumping of the crane and the movements required and experienced in the operation of the crane.

In his June 23, 1981 statement to one of the Board's Adjudication staff and in his August 17, 1981 report of accident, the complainant attributed the aggravation of his degenerative disc disease to the general nature of his work and the movement of the crane. That the complainant could not "attribute his disability to anything specific in his employment" does not appear to rule out entitlement according to the Workers' Compensation Board policy on disablement, as an aggravation of a pre-existing condition.

2) Medical Evidence

The Chairman's letter attributed a great deal of significance to the complainant's complaints of back problems prior to January 19, 1981, yet there is no record of lost time or medical attention for these complaints. As there is no apparent continuity relating these back problems to the January 19, 1981 onset of pain, this would not appear to be a sound basis for denying the claim.

The Chairman in his letter indicates that the opinions of Drs. A and B were made "well after the fact", and he questions the impartiality of Dr. A. Both independent specialists are firm in their belief that the complainant's degenerative disc disease was aggravated by the general nature of his work. Dr. A stated that the complainant's "... back pain was caused by and aggravated by his work..." and in documenting his treatment from January 23, 1981 he does not demonstrate any ambiguity in this opinion.

To consider Dr. A's unfortunate comment regarding a letter from the Workers' Compensation Board which he stated was probably never sent as an indication of his lack of impartiality in this matter, is to question his professionalism. Similarly, I cannot agree that Dr. A was misleading when he stated that he "first saw the complainant for his back disability on Jan. 23-81". In a report dated June 16, 1982, Dr. A stated "... my records clearly and unequivocally show that on Jan. 23/81 the complainant came to see me specifically and primarily regarding low back pain...."

Dr. B did not identify a source for the complainant's disabling back pain until our Office requested a clarification. He was of the opinion that the complainant's work was the cause of his disability, and I cannot appreciate how this opinion can be discounted simply because of the date that it surfaced.

3) Delay in Reporting

Although the Board does not accept the complainant's explanation regarding his delay in claiming compensation benefits, the complainant has indicated that he did not anticipate as lengthy a period of disability as occurred. Once he realized it would not be resolved over the short term, he accepted the initial advice of Dr. A and claimed compensation benefits.

4) Operation of the Crane

While the Board does not dispute that the complainant experienced back pain in January of 1981 while at work, or that there may have been some mechanical operational difficulties with crane #113, it does

dispute that the disability arose out of and in the course of employment and stated that it has not "been established that there was anything about the work which could reasonably be considered to have caused the disablement to come on".

That the crane was particularly difficult to operate is referred to by the statements of co-workers. While the employer disputes the relevancy of these statements, the Workers' Compensation Board has accepted that some mechanical and operational difficulties may have been associated with crane #113.

While the complainant's disability is not attributed to one specific action, it is attributed to his work in general, which involved awkward positions and constant use of jarring equipment.

Summation

The aggravation of a pre-existing condition is supported by the opinions of Drs. A and B. Given the Workers' Compensation Board policy outlining the definition of disablement, the complainant's disability would appear to be allowable on this basis.

The Chairman's response appears to place a heavy burden of proof on the complainant and reflects great doubt as to all of the evidence that supports his claim. In my view, the consensus of medical opinion supports a causal relationship between the disablement the complainant suffered and the work he was performing.

It is therefore my opinion pursuant to section 22(1)(b) of the Ombudsman Act, that it was unreasonable of the Appeal Board to conclude that the complainant's disablement did not arise out of and in the course of his employment. I recommend, therefore, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision dated December 17, 1982 and grant the complainant entitlement to compensation benefits on the basis of an aggravation of pre-existing degenerative disc disease, arising out of and in the course of his employment.

My conclusion and recommendation were reported to the Chairman and the Minister of Labour on November 28, 984. The Chairman responded on March 20, 1985, and advised me that he was not prepared to implement my recommendation. In the absence of something unusual about the work, the Board was satisfied that section 1(1)(a)(iii) of the Workers' Compensation Act did not apply.

I am of the view that this was not an adequate or an appropriate response to my recommendation, and notified the Premier of my findings on March 31, 1985. The complainant was also advised of the results of my investigation and the file was closed.

DETAILED SUMMARY NO. 15

This complaint against the Workers' Compensation Board was registered with this Office in a letter dated September 26, 1983 from the complainant's lawyer. The complainant advised that she was dissatisfied with Appeal Board decisions dated February 2, 1981 and May 27, 1983.

On October 20, 1983, the Chairman of the Workers' Compensation Board, was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complaint, which was summarized as follows:

> (1) That the Appeal Board, in its decision dated February 2, 1981, was unreasonable to deny that personal injury by accident arising out of and in the course of her employment has not been established; and,
>
> (2) that the Appeal Board in its decision dated May 27, 1983 was unreasonable to find that the reports of [Dr. A] and [Dr. B] did not contain evidence which would cause the Appeal Board to vary, amend or revoke its decision of February 2, 1981 nor to grant a new hearing.

The Chairman was also asked if he wished to provide a statement of the Board's position. In a response dated November 10, 1983, the Board declined to make a statement at that time.

Our file on this complaint was then assigned to a member of our investigative staff, who thoroughly reviewed the Workers' Compensation Board claim file supplied by the Board and discussed the complaint with the complainant over the telephone.

Our investigation has revealed that on January 29, 1980 the complainant, a seamstress, was seated at a sewing table across from a co-worker when an 8-foot fluorescent light fixture with two bulbs crashed down, showering her with white powder. She looked across the table to find her co-worker on the floor, bleeding from the head. The injured co-worker received compensation benefits. The complainant described the incident at an Appeals Adjudicator hearing on June 17, 1980:

> I see this friend - scream and come for help and I see the blood come from the head and eyes, and come from the nose, it go down - scream - scream, I think maybe the lamp fall in the head and break the head.

A co-worker described the incident at an Appeal Board hearing on November 13, 1980:

> I stood there like most people and watched these lights fall and there was a lot of screaming going on and after they had fallen there was like a period where there was dead silence and then one lady was screaming and no one knew where she was and that's when I ran over to find out where the screaming had come from, and the one woman who was injured was under the coatrack by her sewing machine, or her table, and then a lot of other people had run over and tried to drag her out from underneath, and she was screaming and there was blood all over her....

The complainant was shaken by the experience, describing her reaction as a feeling of shock. She could not speak and she could not walk without assistance. Her family physician, Dr. C, diagnosed acute nervous tension. It was Dr. C's opinion that no time off was warranted and that the complainant's condition was not work-related. The complainant returned to her job on February 4 and worked for three days with increasing anxiety. She laid off work February 7, 1980 and claimed compensation benefits.

Dr. H of the Board recommended rejection of benefits on February 15, 1980 on the basis that the accident had "no psychopathogenic qualities".

On April 18, 1980, Dr. D, an otolaryngologist, seeing the complainant for tinnitus, noted an anxiety reaction and her comment that she was almost going crazy.

On April 24, 1980 the complainant's claim was rejected on the basis that she was witness to an accident but did not suffer any physical injury, and that her physician felt that no lost time from work was warranted.

On June 27, 1980 Dr. C spoke to a Workers' Compensation Board investigator and reported that she had suggested that the complainant see a psychiatrist in 1978.

On August 19, 1980 the Appeals Adjudicator denied the complainant's claim on the basis that the accident was not of sufficiently traumatic nature to cause her symptomatology, that she had experienced similar problems in the past, and that her acute nervous tension did not arise out of or in the course of her employment.

Dr. E, an otolaryngologist, saw the complainant on August 27, 1980 and described her as very depressed. He also noted that when he saw her in 1973, she complained of the feeling that she might go crazy.

Dr. F, a psychiatrist, saw the complainant on September 22, 1980, October 1, 1980 and October 16, 1980. He reported that the

complainant complained of fearfulness, weakness, an echo in her ears, dizziness, sleep disturbance, feeling hot, and occasional nausea and vomiting, dating back to the accident of January 29, 1980. Dr. F felt that she might have been suffering anxiety and depression for some years. He neither diagnosed the complainant's condition nor described its etiology.

The Appeal Board concluded on February 2, 1981 that the complainant was a witness to but was not involved in the accident of January 29, 1980, and denied her appeal.

On February 5, 1981 the complainant was examined by Dr. G, an otolaryngologist. He noted an "apparent persistent depression".

Dr. B, a psychiatrist, saw the complainant in September 1981 and May 1982. In a report to the Workers' Compensation Board on June 28, 1982 he wrote:

> The presenting problems were the complainant's feelings of sadness and hopelessness, her basic anxiety about leaving her house and participating in social activities, a lack of energy and interest in people and events around her, difficulty in performing simple household tasks and problems with her sleep. In addition, she presented a collection of vague, bothersome physical complaints including numbness in her arms and legs, headaches and hearing problems.
>
> She had also noticed that her appetite was down. She had lost 30 pounds in weight. She had been unable to participate in family activities, where her functioning was well below the level it had been prior to the onset of the problems and she had much less confidence in herself. During this period, she had been unable to work due to her anxiety, depressed feelings and tearfulness and her lack of self-confidence.

He wrote further:

> There is little doubt in my mind that the current problems were not an exacerbation of an underlying process or an inevitable event in the life of this lady. I feel they were directly contributed to by the accident at work, in conjunction with the failure to find appropriate treatment immediately afterwards.

His diagnosis, according to the American Medical Association's Diagnostic and Statistical Manual III criteria, was Adjustment Disorder with Mixed Emotional Features. Dr. B noted that the complainant had responded well to anti-depressant medication, brief focal psychotherapy and supportive behavioural therapy to a point where she was now ready to return to work.

Dr. A, the complainant's new family physician, wrote to the Workers' Compensation Board on September 13, 1982:

> The change in her level of functioning subsequent to the incident at work was clearly a sign of a major change in her health. There are no other factors in her environment which could have caused such an illness.
>
> I would submit therefore that the patient's claim for compensation benefits for illness arising out of and in the course of her employment is in order.

The Appeal Board directed that the complainant's case be reviewed by the Psychiatric Consultant, Dr. J, who interviewed the complainant on November 29, 1982 and concluded his report by writing:

> It also must be stated unconditionally that this lady did not suffer an accident, but merely witnessed one. It is impossible for me to consider that this accident as such was so psychotraumatic that she was unable to return to the work force for almost 3 years. To account for her disability, one has to consider deep-seated personality-related elements and possibly considerations of secondary gains. I could not recommend acceptance of psychiatric entitlement in this case.

In response to Dr. J's report, Dr. B wrote on April 5, 1983:

> I believe that if the incident had not taken place, the complainant would not have suffered the disabling psychiatric effects that followed it, that it was not a response to a natural life event, and that the incident took place in the work place.

On May 27, 1983 the Appeal Board found that the reports of Dr. B and Dr. A did not contain evidence which would cause the Board to vary, amend or revoke the decision of February 2, 1981 nor to grant a new hearing.

During the course of my investigation, I formed the tentative view that I might conclude, pursuant to section 22(1)(b) of the Ombudsman Act that:

> (1) the Appeal Board in its decision dated February 2, 1981 was unreasonable not to find that the complainant was involved in an accident resulting in personal injury in the course of her employment; and

(2) the Appeal Board in its decision dated May 27, 1983 was unreasonable to find that the reports of Dr. A and Dr. B did not contain evidence which would cause it to vary, amend or revoke its previous decision of February 2, 1981, nor to grant a new hearing.

In a letter dated April 19, 1984 I advised the accident employer and the Chairman of these possible conclusions and my consequent possible recommendation. In support of the first possible conclusion, I pointed out:

> The complainant was involved in an accident at work on January 29, 1980. She was in the immediate vicinity of a falling light fixture, was showered with debris, was apparently knocked to the floor, and required assistance in order to move to the First Aid area. The complainant immediately exhibited signs of personal injury in the form of a psychologically disabling condition. Prior to the accident she was not disabled but, subsequent to it, every physician she attended noted psychological problems.

In support of the second possible conclusion I pointed out:

> Dr. A, a family physician, and Dr. B, a psychiatrist, were the only attending physicians who addressed in depth the issue of the complainant's psychological disability and its etiology. They were both of the opinion that she was disabled and that her disability could be attributed directly to the work accident of January 29, 1980. Dr. J of the Board disagreed that the complainant's disability could be attributed to the work accident. Considering the complete variance of opinion between the attending physicians and the Board's psychiatrist, the Board should have taken it upon itself to reconsider the reports of Dr. A and Dr. B.

My letter of April 19, 1984 went on to state my possible recommendation:

> The Appeal Board should revoke its decisions of February 2, 1981 and May 27, 1983 and grant entitlement to the complainant for personal injury by accident arising out of and in the course of her employment. [Reference: the Ombudsman Act, section 22(3)(g)]

The accident employer responded to my letter of April 19, 1983 on July 5, October 1, and December 21, 1984. He supported the Appeal Board's decision, noting that the complainant had been absent from work for long periods in 1978 and 1979, that she had emotional problems in the

past, that her family physician did not recommend time off from work, and that the complainant was not physically injured.

The Chairman's August 3, 1984 response to my letter of April 19, 1984 stated that since the complainant did not sustain a physical injury, her claim could only have been accepted if the accident had some psychopathogenic quality, that is, if it had been particularly horrifying, resulting in severe injury or death to others. I note that both the complainant and a co-worker described the events of January 29, 1980 as disturbing. Her attending psychiatrist was of the opinion that the accident was sufficiently traumatic to have precipitated her emotional disability.

The Chairman's August 3, 1984 letter went on to refer to a "crucial inaccuracy" made by Dr. B in stating that a lightbulb had exploded and injured the complainant and a co-worker, rendering his conclusions unacceptable to the Appeal Board. I note that Board policy defines "injury" to include both physical and emotional disability and Dr. B, a psychiatrist, is qualified to judge emotional disability. The complainant's co-worker received contusions and lacerations. Since in my view both women were injured, Dr. B's comment does not appear to constitute a crucial inaccuracy.

The Chairman's letter of August 3, 1984 stated that Dr. C's evidence regarding the complainant was preferred to that of Dr. A and Dr. B because of her past close association and her involvement at the time of the accident, and because Dr. A's advocacy tended to make his evidence less objective. I note that Dr. C was recorded by a Board investigator in June 1980 as having seen the complainant on January 29, 1980 and noting that she was very depressed, as telling her there was nothing wrong with her in February 1980, as telling her that she (Dr. C) was fed up in May 1980, and that everything was perfect in June 1980. Meanwhile, other physicians examining the complainant close to the time of the accident noted psychological difficulties: Dr. D in April 1980, Dr. E in August 1980, and Dr. F in September 1980. It would appear that Dr. C's view of the complainant and her problems was not more objective than that of Dr. A and ought not to be preferred. Her opinion, that of a general practitioner, should not be preferred over that of Dr. B, a psychiatrist.

In summation, the Chairman's August 3, 1984 letter stated:

> ... the Appeal Board cannot agree that its decision was unreasonable, and consequently will take no steps to implement your tentative recommendation.

This Office asked Dr. B on August 27, 1984 to clarify his use of the term "injury" in referring to the complainant's experience in January 1980.

Dr. B replied on September 25, 1984 that the complainant had suffered a psychological rather than a physical injury. Furthermore, comparison of the history as related by the complainant with other reports and with interviews of other family members led Dr. B to believe she was a reliable historian. He went on to say:

> The Workmen's Compensation Board appears to have based their case on the assumption that, as the incident that the complainant witnessed was a relatively minor one, it should not have been responsible for creating a psychiatric disability. While it is very difficult to assess the meaning of psychosocial stressor to any particular individual, different people are susceptible to different stresses.
>
> The most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM3) has recognized for the first time the post-traumatic stress disorder which can be either chronic or delayed. It describes the essential feature as being the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience. In my estimation, I believe that the episode with the light bulb was an unusual and extremely distressing experience for the complainant.

Dr. B reiterated his opinion that the incident was directly responsible for the complainant's psychological disability:

> ... If the incident had not occurred the complainant would not have experienced any psychiatric problems at the time that she did, nor was she likely to develop longstanding psychiatric symptoms that would incapacitate her to the point where she was unable to work. These are directly due to the reaction to the traumatic event.

Dr. B's letter of September 25, 1984 was sent to the Board as new evidence on October 10, 1984.

The Appeal Board requested that Dr. J, the Board's Consultant Psychiatrist, review Dr. B's letter and give his opinion. Dr. J wrote on December 4, 1984 that he considered Dr. B to be a very determined advocate for the complainant and critical of Dr. C for not providing adequate treatment. Dr. J drew attention to Dr. B's statement that the complainant had been injured when the lightbulb exploded and labelled it a "misstatement of fact," reflecting misinformation provided by the complainant. Dr. J continued to contend that the complainant was an unreliable informant. He was of the opinion that it was absurd to consider that the accident she witnessed was so psychotraumatic as to preclude her return to work for more than three years. Dr. J concluded:

> ... at the time of my interview, the claimant displayed not the slightest evidence of psychiatric symptomatology which could conceivably warrant an award.

On December 31, 1984 the Board responded to our new evidence letter of October 10, 1984:

> Having reviewed Dr. B's report as well as the report from Dr. J, the Appeal Board could not conclude that its decisions of February 2, 1981 and May 27, 1983, ought to be changed.

Before reaching a final conclusion in this case, I have again carefully considered all of the factors involved, as outlined in my letter of April 19, 1984, and reflected upon the Board's August 3, 1984 response to that letter. I am of the view that the Chairman's response does not constitute a significant refutation of the information outlined in my letter of April 19, 1984 in support of my possible conclusions and subsequent possible recommendations. I note that the complainant was involved in an accident at work, immediately exhibited signs of personal injury in the form of an emotional disability, continued to exhibit an emotional disturbance as observed by attending specialists, and was diagnosed by her attending psychiatrist as having an Adjustment Disorder with Mixed Emotional Features.

I have also carefully reviewed the Board's December 31, 1984 response to our letter bringing to its attention Dr. B's report of September 25, 1984. I note that the opinions of Dr. J, a psychiatrist for the Board, and Dr. B, the treating psychiatrist, are in diametric opposition as to the complainant's psychological condition and its cause. I note also that Dr. F neither diagnosed the complainant's condition nor described its etiology. As well, I note that the Board's policy on Benefit of Doubt states:

> When applied to an injured worker, the effect is that the worker does not require a preponderance of evidence in support of his claim. Rather, if there is doubt on any issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the injured worker.

In the complainant's case the evidence for and against her claim comes from two fellows in psychiatry. There is no reason, as far as I am aware, to place more weight on one opinion than on the other. Consequently, the policy on the benefit of doubt applies.

Accordingly, it is my opinion that the Appeal Board's decisions of February 2, 1981 and May 27, 1983 were unreasonable in that they failed to extend to the worker the benefit of doubt when considering the medical evidence.

It is, therefore, my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board should revoke its decisions of February 2, 1981 and May 27, 1983, and grant entitlement to the complainant for personal injury by accident arising out of and in the course of her employment.

This recommendation was included in a report to the Chairman dated March 11, 1985.

The Board had not responded to the report and recommendation by March 29, 1985. I therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 16

The complainant's original complaint against the decisions of the Appeal Board of the Workers' Compensation Board dated October 13, 1981 and December 7, 1981, was brought to the attention of this Office during an interview at the Thunder Bay Regional Office on February 12, 1982.

On April 27, 1982, the Workers' Compensation Board was notified of our intention to investigate the complaints, which were summarized as follows:

> The complainant contends that it was unreasonable of the Appeal Board, in a decision dated October 13, 1981 to deny him entitlement for cervical disability as related to his industrial accidents of September 14, 1951; October 29, 1957; April 22, 1965; September 20, 1966; November 6, 1974 and January 13, 1977.
>
> The complainant agrees that, as the Appeal Board noted, it may not have been specifically established that he sustained injury to his cervical spine in any of his accidents. However, he points out that he has a medical history of cervical problems dating back to Dr. B's report of September 18, 1970, through Dr. C's letter of January 7, 1972 to Dr. J' letter of May 3, 1974 and continuing. Further, the complainant contends that the Board should consider the number of accidents he has experienced relating to his back or shoulders and the probability that those could have affected the cervical area as well. The complainant feels that his work record and his attempts to continue working attest to the integrity of his statements and his credibility as a witness should be noted.

Moreover, given that he is currently assessed by the Board as 60% disabled as a result of his back problems, the complainant points out that it was only natural that throughout the years, he gave priority to this back in the reporting of his injuries as it was and is more severely injured than his neck.

Taking all these factors into account, the complainant contends that it would be reasonable of the Board to grant him entitlement for cervical disability.

In its letter dated May 5, 1982, the Board declined to comment. The file was subsequently assigned to a member of my investigative staff for investigation. During her investigation, the investigator was informed by the complainant that there was another issue under dispute, relating to the apportionment of the complainant's pension. Subsequent to an Appeal Board decision dated March 28, 1983, another letter was sent to the Board on April 26, 1983, notifying the Chairman of our intention to investigate this aspect of the complaint as well, which was summarized in the following manner:

That the Appeal Board decision dated March 28, 1983 was unreasonable to deny his appeal to have his pension of 60%, currently fully payable under [the 1951] claim, divided among his three major claims.

The complainant states that it was factually incorrect of the Board to have noted and accepted that his accident of October 29, 1957 appeared to have been a minor aggravation which required medical aid attention only. He refers to the October 16, 1982 letters of the treating physician for that accident, Dr. A, who wrote both that the 1957 injury "required hospitalization" and that it was a "major accident". As only Dr. A treated the complainant for this accident, the complainant does not understand why the only first-hand medical observations were not accepted by the Appeal Board.

Further, the complainant points out that Dr. D, who treated him at the Clinic after Dr. A left, also confirms that the 1957 and 1974 accidents resulted in "definite acute injuries". The complainant accepts that he worked after his second and third accidents; however, he notes that he worked after his first accident as well. After both the first and second accidents, he returned to modified employment for several months.

The complainant contends that on the basis of medical evidence and taking into account his employment history, the Board should reconsider its decision.

In a letter dated May 16, 1983, the Assistant Secretary responded on behalf of the Chairman. He pointed out that the accident of October 1957 had not required lost time from work and that a review of Dr. A's report failed to reveal any indication that the 1957 injury required hospitalization.

During the course of this complex and involved file, several letters containing new evidence were sent to the Board at various times, but, in each case, the Board declined to change its opinion. Thus it should be borne in mind that any recent medical reports referred to during the course of this report have been seen and noted by the Board. Also, for the sake of clarity, it should be noted that I will discuss the apportionment of pension and cervical entitlement separately within the body of this report.

Our investigation has revealed that during the course of his employment, the complainant suffered three significant injuries to his back, right leg, and shoulder area. The first of these occurred on September 14, 1951 when the complainant was 23 years of age. While loading tires at a railway platform, he lost his balance, which resulted in several tires falling on him, causing pain to his lower back and right leg. He originally tried to return to work on October 15, 1951, but suffered increasing pain and was forced to lay off by the afternoon. He was hospitalized from October 16 to 24 with a ruptured intervertebral disc, L5-S1. Treatment was conservative and the complainant returned to work on light duties as of November 5, 1951; after a few months, he returned to his regular duties.

Although the complainant occasionally suffered from back pain, as noted in the letter of November 24, 1956 from his family physician, Dr. A, he was able to keep working steadily throughout the next five years. However, in the fall of 1956 his disc problems worsened and, in December of that same year, orthopaedist Dr. F performed a laminectomy and discotomy on the right at L5-S1 for herniated disc. The complainant was off work until March 18, 1957, when he resumed his regular duties. He continued to have some problems with his right foot but was otherwise able to work steadily.

On October 29, 1957, the complainant's second occupational accident occurred. While rolling a ten-foot-high tire, he lost his balance and had to support the 1500-pound weight of the tire above his head for approximately half a minute. Although the employer's report indicated that there was no layoff and no medical aid, it also stated that he did go to the hospital for x-rays. The Board has always been of the position that this accident was minor, with no medical aid required. However, medical documentation has established that Dr. A saw the complainant the following day, diagnosing lumbosacral strain and possible exacerbation of disc; he also estimated a two-week disability. Further

evidence on file has revealed that the complainant was hospitalized at least for the weekend and certainly went on light work at the tire shop until May of 1958.

The complainant saw his surgeon, Dr. F, on November 29, 1957 because of pain in his back. Dr. F was of the opinion that he was suffering from the after-effects of recurrent strain coming on his lumbosacral disc. The surgeon was hopeful that the pain might clear up, as was the case prior to the second injury.

Because the pain in his back and leg continued, the complainant underwent a pension assessment in August of 1959 and received a 10% permanent disability award. He continued to work full-time (transferring to another company in 1959) until the spring of 1973, when he was off work for four months as the result of a non-compensable myocardial infarction. By this time his back and leg disability pension had been increased to 25%.

In August of 1973, the complainant saw orthopaedist Dr. E because of increasing back pain and progressive weakness of the right leg. He was off work between October 29 and November 26, 1973, during which time he was admitted to hospital where Dr. E performed a steroid injection of the S1 root. Surgery was not contemplated at that time because of the recent heart problems.

The complainant returned to work at the end of 1973 and performed his normal duties until November 6, 1974. At this time he slipped on a pipe and fell, striking his back heavily. Dr. D, his family physician, diagnosed acute lumbar strain and possible aggravation of previous disc. No time was lost and the complainant continued to work. However, his back began bothering him more and Dr. E felt that his last accident had stirred up his old back problems and, consequently, on May 19, 1975, the surgeon performed: 1) right L4/5, L5/S1 laminectomy and exploration of L5 and S1 root; 2) neurolysis and rhizotomy right S1 root; 3) foraminotomy and excision of right pedicle, L4; 4) interdiscal injection of chymopapain L4/5; 5) three-segment intertransverse fusion L3 to sacrum.

The complainant returned to work on October 4, 1976 but took an early retirement effective August 30, 1979, as he no longer felt capable of continuing heavy manual work. At the time of his retirement, he was in receipt of a 60% pension. A 10% award, retroactive to May 19, 1975, was granted in June of 1983, giving the complainant a pension of 70%.

During the course of the investigation, it was noted that the complainant's file had been opened under his 1951 accident and that all subsequent awards were processed under that claim. Whenever he saw a new doctor or orthopaedic surgeon, he was automatically listed under that

claim. There is unanimous agreement amongst Board physicians who have assessed the complainant that he is severely disabled. The question of the contributory effects of the 1957 and 1974 accidents to the complainant's severe disability was not raised as an issue until 1978. On July 26, 1978, Dr. E wrote that the complainant had been involved in a further accident in November of 1974 which stirred up all the problems in his back with the development of increasing pain and sciatic distribution; it was because of this he was admitted to hospital.

In an effort to clarify the nature and extent of the latter accidents' importance in the complainant's disability history, his treating physicians, Drs. A and D, were written for their respective opinions. Dr. A, who treated the complainant from 1951 to the early 1960s, responded as following in a letter dated October 16, 1982:

> I saw the complainant on October 30, 1957 following an injury to his low back on October 29. This required hospitalization on October 30, 1957.
>
> Although I wrote possible exacerbated [sic] of disc disorder on the initial report, subsequent examinations confirmed that he had sustained a major injury as confirmed by my notes of November 25, 1957 and November 30, 1957. He was in fact, not allowed back on normal heavy work in the tire shop until May 1958.
>
> I saw the complainant on November 25, November 30, 1957, April 3, 1958, April 23, 1958, June 4, 1958, July 9, 1958, July 24, 1958, October 21, 1958, October 28, 1958, December 1, 1958, February 23, 1959, February 24, 1959, July 31, 1959, September 28, 1959, January 21, 1960. A total of 15 visits.
>
> Over this entire period there were symptoms and objective signs of severe and progressively disabling back disease. During much of this time the workman continued to be self-supporting, despite continued pain on a job involving heavy labour.
>
> It is my considered opinion that the injury of October 29, 1957 was a major episode leading to this workman's eventual inability to carry on in July 1979.

Dr. D, the complainant's family physician from the 1960s to the present, wrote to the Board in November of 1982, stating:

> This is to confirm that the injury sustained by the complainant in October 1957 and November 1974, were definite acute injuries and exacerbated the 1951 injury.

The Appeal Board decision of March 28, 1983, denied the complainant's request to apportion his pension amongst his three claims for the following reasons:

1) The original accident occurring on September 14, 1951, led to a major disability, requiring surgery in 1956;

2) The accidents occurring on October 29, 1957 and November 6, 1974 appear to have been minor aggravations of the already existing back problems and required medical aid attention only;

3) The complainant was able to carry on with his work subsequent to the second and third accidents;

4) The preponderance of evidence on file did not support that the second and third accidents contributed significantly to the complainant's overall disability.

On February 17, 1984, the Temporary Ombudsman advised the Chairman of a possible conclusion and recommendation pursuant to section 19(3) of the Ombudsman Act. He tentatively concluded that the Appeal Board, in its decision dated March 28, 1983, was unreasonable to deny the complainant's request for apportionment of his pension amongst his three major claims. In support of this conclusion, the Temporary Ombudsman noted the medical opinions from Drs. E, D and A which supported the importance of the 1957 and 1974 accidents in regard to the complainant's progressively worsening disability. The Temporary Ombudsman also found that the Board had no medical opinions from its own physicians to support its position that the second and third accidents were minor in nature. The Temporary Ombudsman also commented that of the factors cited in the Board decision to support its position, only the first one can be accepted. It was pointed out that hospitalization was required for the 1957 accident (point number 2); that the complainant went on light duty following the first and second accidents (point number 3) for an equal amount of time, and that any of the medical evidence that specifically addressed the importance of the second and third accidents in relation to the complainant's overall disability did indicate their significance (point number 4). The Temporary Ombudsman also stated that although Drs. A and D were not specialists, it was the case that they were the treating physicians at the time of the 1957 and 1974 accidents respectively. Therefore, they would have been in a special position to evaluate the immediate and long-term effects of these accidents on the complainant's overall disability and, accordingly, it would appear that their opinions should be given some weight.

The Temporary Ombudsman tentatively recommended that the Appeal Board revoke its decision of March 28, 1983 and apportion the complainant's pension in an appropriate manner amongst the three major claims.

The Chairman responded in a letter dated April 30, 1984. In his response, the Chairman stressed the seriousness of the first accident in 1951 which necessitated surgery in 1956 for a herniated intervertebral disc. The Chairman also stated that the Temporary Ombudsman's earlier letter conceded that the worker was not required to lose any time from work. The Chairman also pointed to a medical report from Dr. F which he felt undercut any significance of the 1957 accident. The Chairman also called into question Dr. A's report of progressively disabling back disease and noted two further reports from Dr. F which did not mention any effect of the 1957 accident.

With regard to the importance of the 1974 accident, the Chairman pointed out that Dr. E had contemplated surgery prior to the time of the accident. In conclusion, the Chairman could not agree that the Appeal Board's original decision not to grant apportionment amongst the three claims had been unreasonable.

In an attempt to clarify certain of the medical issues raised by the Board in its response, Dr. D was contacted and asked to refer to his records. He sent a lengthy letter to my Office on June 18, 1984, a copy of which was forwarded to the Board for its consideration.

Dr. D provided several specific analyses and reasons for the importance of the 1957 and 1974 accidents. However, the Board did not feel there were sufficient grounds on which to reverse its decision.

I have considered and carefully reviewed all the voluminous medical opinions as well as the representations of the Board. It seems to me, in part, that the lengthy response of the Chairman to this Office's original letter has not dealt directly with the issue raised. In any file the size of the complainant's, various comments can probably be taken to bolster any given point and certain phrases used to forward one's own view. I would stress that it is inappropriate to look at the complainant's case in an adversarial light; rather, all concerned should be endeavouring to see whether the majority of medical evidence addressing the issue supports or disproves the claim. Again, I must reiterate that the reports of Dr. A, Dr. D and Dr. E weigh heavily in my consideration. The Board questions Dr. A's conclusion that the 1957 accident was major; however, it must be borne in mind that Dr. A treated the complainant for over a decade, referred to his own extensive notes, and arrived at his medical conclusion. I do not feel qualified to second-guess the doctor and I accept his conclusions as stated. The same applies to Dr. D. It is quite clear from the material the doctors supplied that they have gone through all of their records in depth and have reached their considered medical opinions.

Again, one must consider whether a treating orthopaedic surgeon, such as Dr. F, would think to apportion the complainant's injury

between the two accidents when he was not asked to do so. Rather, he was primarily interested in the 1956 surgery which he performed and, as a result, the complainant's recovery from that surgery. At that time, the question of entitlement for the 1957 injury was not an issue and could hardly have been raised. Moreover, Dr. F did acknowledge that the complainant's recovery from his 1956 surgery had been progressing satisfactorily until the new incident (of 1957).

It is not my intention to suggest how the Board should apportion the pension; I believe that that is a matter best left to its own discretion. Nevertheless, after carefully considering all of the evidence, I have concluded, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of March 28, 1983 was unreasonable and, accordingly, it is my recommendation, pursuant to section 22(3)(g) of the Act, that the Appeal Board should revoke its decision and apportion the complainant's pension among his three major claims.

I would like to turn now to the question of cervical entitlement. As well as the three major incidents described in the first part of the report, the complainant suffered three other injuries involving his upper torso. A number involved wrenching or twisting to the back and shoulders. Not only did the complainant have numerous accidents during his employment history, he also underwent major surgery in 1957 and 1974. In 1973, he suffered a myocardial infarction and was off work for some four months. As well as a continuous history of back pain, the complainant has had documented and accepted hip, right leg and foot disabilities resulting from nerve root irritation in his back. The complainant's right leg is considerably atrophied and there is marked claw deformity of his right foot.

I mention all of these injuries by way of a background for the complainant's history of cervical pain. After his accident in 1957, which involved holding a 1500 pound tire above his head for several seconds, the complainant began to complain of neck pain and dizziness. There are, as provided by Dr. D in his June 1984 letter to my Office, medical reports of 11 specific instances of complaints of the neck and shoulder region in the 1960s. From 1970 onwards, there is consistent mention of neck pain in the medical reports.

Cervical x-rays taken in March of 1970 showed osteophytes at C5 and C6 with a narrowing of disc spaces between C5-6. Various specialists commented on neck pains in their reports from the 1970s. Dizzy spells and neck pain continued and in 1978, the complainant formally requested entitlement for his cervical disability from the Board.

A memo dated November 16, 1978 from a Pensions Adjudicator, noted that the complainant was concerned that a ruling be made on entitlement for neck disability which was related to the 1957 accident. In

her disposition, the Pensions Adjudicator observed that the file would have to be referred to Claims and commented as follows:

> It is quite obvious that the man has had ongoing neck problems for a number of years but it is questionable as to whether or not these should be considered compensable in view of the fact that in 1970 the diagnosis was cervical disc disease.

Dr. G, Surgical Consultant for the Board, reviewed the claim file and in a memo dated January 15, 1979, stated:

> I do not think that there are reasonable grounds on which we could extend his entitlement under this claim [1951 accident] to include his neck region.

During the complainant's admission to the Back Assessment Rehabilitation Centre in January of 1979, Dr. H opined that the cervical spondylosis was probably an independent condition unrelated to the injuries described.

In a memo from February 26, 1979, Board personnel relayed the following information from an interview with the complainant. Apart from some cervical pain following his 1956 surgery, the complainant did not experience any consistent problems with his neck until following his accident of 1957. Following this memo, Dr. G looked at the records again but maintained his previous opinion, although no reasons were given. In its decision dated October 13, 1981, the Appeal Board noted that:

1) it had not been established that the complainant had sustained injury to his cervical spine in any of his accidents;

2) The opinion of the Board's Surgical Consultant was that the cervical disability was not related to the accidents.

Consequently, the complainant's appeal was denied, as was his wife's letter to the Board requesting reconsideration in a decision dated December 7, 1981.

Following the Appeal Board decision, further evidence was obtained from Drs. A and D. In Dr. A's letter, he stated that the complainant's 1957 accident was an important factor in the subsequent development of cervical spine degenerative disc disease. Dr. D reviewed the file and stated that very definitely the complainant's neck problems were related to his injury of October 1957 and exacerbated by subsequent injuries of 1965, 1969 and 1977.

Although these letters were sent to the Board as new evidence, the Assistant Secretary, on behalf of the Appeal Board, notified my Office that they were not sufficient to cause the Appeal Board to change its views.

A letter was sent from this Office on February 17, 1984 with the possible conclusion that the Appeal Board was unreasonable to deny the complainant's request for entitlement to his cervical disability and the possible recommendation that the Appeal Board should revoke its decisions and grant him entitlement. That letter noted the series of accidents to the complainant's upper torso, the letters of Drs. D and A relating it to the work accidents, the complainant's own testimony that the cervical pain came on following the 1957 accident, and the fact that the new evidence had never been forwarded to the Medical Branch for an updated report.

In the Chairman's response of April 30, 1984, he agreed there was intermittent cervical discomfort between 1957 and 1960, but noted that the first documented complaint did not occur until five months after the accident in 1957. The Chairman commented that there was a 10-year period between 1960 and 1970 when there was no documented evidence of any neck problems, in conjunction with the fact that, when the complaints recurred in 1970, the diagnosis was degenerative disc disease.

The Chairman also noted that Dr. G had been consulted for his opinion on the more recent reports from Drs. A and D. He quoted at length from Dr. G's memorandum, which concluded with his firm medical opinion that there was no evidence to relate the complainant's cervical problems of a degenerative nature to his accidents. Dr. G also concluded that the letters from Drs. A and D represented benevolent advocacy and did not offer a vestige of a reason for the opinions they stated.

I have carefully considered all of the evidence relating to this issue and am still convinced that the complainant's cervical disability can reasonably be attributed to his employment history. As Dr. D's most recent letter points out, there were several documented occasions of complaints for neck pain in the 1960s. Given the complainant's history of working whenever possible despite his exacerbating disabilities, it is not surprising that there are not that many complaints on record.

Dr. G, in his memo, felt that Drs. D and A were not giving medical opinions per se. A careful perusal of Dr. D's and A's letters does not support this, as they have proceeded on the medical evidence to give their interpretations. I am again guided by the fact that Drs. A and D have seen the complainant on an ongoing and continuous basis. They have all of his records at their disposal, and are in the best position to judge whether or not it is likely that his neck problems have resulted

from his documented twisting injuries to the back and shoulders. I agree that one cannot state with certainty that any particular accident or accidents have caused or aggravated the complainant's cervical disc degeneration. However, the probability of this causal relationship is sufficiently compelling for me to support the case. Therefore, I conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decisions were unreasonable to deny the complainant entitlement for his cervical disability, and I recommend, pursuant to section 22(3)(g), that the aforementioned decisions be revoked and that the complainant be granted entitlement in accordance with the Board's assessment of his actual cervical disability.

This recommendation was included in a report to the Chairman dated February 15, 1985.

The Board had not responded to the report and recommendations by March 29, 1985. I therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 17

The complainant approached this Office on August 11, 1982, with a complaint against a decision rendered by the Appeal Board of the Workers' Compensation Board dated July 23, 1982. The complainant contended that the Appeal Board was unreasonable to have denied his request for psychiatric entitlement. The Appeal Board had concluded that the complainant's psychiatric disability "diagnosed as psychoneurotic reactive depression, [was] not causally related to the industrial accident."

On September 8, 1982, the Chairman of the Workers' Compensation Board was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complaint. The Chairman was invited to make a statement of the Board's position with respect to the complainant's contention.

On September 14, 1982, the Assistant Secretary responded on the Chairman's behalf by stating that the Board did not wish to make a statement at that time.

This complaint was assigned to a member of my investigative staff, who thoroughly reviewed the complainant's Workers' Compensation Board claim file and considered the relevant legislation and Board policy and practice relating to the issue.

The investigation revealed that on October 9, 1969, the complainant, then 41 years old and employed as a labourer, injured his back while moving a cement block. The initial diagnosis was a lumbo-sacral strain. The Board granted the complainant entitlement for his lumbo-sacral strain and paid him temporary total disability benefits from October 10, 1969 to December 29, 1969. Subsequently, due to exacerbations of back pain, the complainant laid off work. He received conservative medical treatment and compensation benefits on numerous occasions.

On January 19, 1979, the complainant laid off work and complained of back pain which radiated into his legs. His family physician, Dr. E, diagnosed an acute L5-S1 protruded disc. This diagnosis was not substantiated by subsequent medical investigations. On February 6, 1979, an orthopaedic specialist, Dr. D, related the complainant's back pain to lumbar degenerative disc disease. The complainant received temporary total disability benefits from January 22, 1979 to April 28, 1980. Following a pension reassessment on April 2, 1980, the complainant's organic pension award was increased from 10% to 20%.

The medical documentation subsequent to January 1979 revealed that the complainant was examined by several specialists. On March 2, 1979, Dr. D reexamined the complainant and noted that he was complaining of bilateral leg pain and "... back pain with almost anything ...." Dr. D also reported that:

> ... [the complainant] is obviously quite depressed today because when I suggested some rest in hospital would be indicated, but that he was not going to be a candidate for surgery, he was obviously upset. I spent a good deal of time talking with his daughter explaining to her what is going on with the complainant and I think she appreciates the psychological component of his illness is significant.... This man is not a candidate for surgery.... We'll simply have to manage him conservatively....

No specific diagnosis was provided in this report. However, this was the first indication by a physician of any psychiatric component.

The complainant was admitted to the Board's hospital on August 27, 1979 and discharged on September 28, 1979. Dr. C, the admitting physician, noted upon examination that the complainant displayed "... some over-reacting and there were many inappropriate responses." No psychiatric diagnosis was provided. Two days later, Mr. S, PhD. (a psychometrist) conducted a personal appraisal and reported that:

Subjective findings:

The patient complained about considerable back pain. During the last 10 years, he always had his ups and downs. His sleep is poor because of pain. His appetite is diminished because of medication.... His pain sometimes becomes so severe that he starts crying.... He has no debts, but as their financial situation is deteriorating he is afraid that he will have to sell his house.

Objective findings:

The complainant is a depressed looking man in his fifties.... He was cooperative, but on one occasion he started crying.... Projective test showed depression, defensiveness anxiety, feelings of inferiority and an excessive sense of self-criticism. He is a schizoid type of person and there is some moderate over-reaction to his injury.

Assessment and Plan:

This man is chronically ill and there is very little hope that he might respond to treatment. On emotional grounds he might be completely disabled. Increase of his disability pension might be considered.

The first psychiatrist to examine the complainant, Dr. O, did so on September 5, 1979. Dr. O's report reads in part:

... He appeared mildly depressed. There was no evidence of delusions and hallucinations nor of malingering.

The complainant told me that his condition is worsening every year. He complained of constant pain.... He feels nervous and depressed.

Concerning his future, he feels quite pessimistic due to his condition.

This patient has developed a psychoneurotic reaction with an element of reactive depression triggered off by his back injury of 1969 and repeated exacerbations. He gave the impression of having reached the point where he would give up. Nevertheless, it may be worthwhile putting him on an antidepressant on a trial basis ... in combination with a Back Education Program and Counselling.

Dr. L, an Orthopaedic Consultant for the Board, examined the complainant on September 28, 1979 and noted that "... clinical testing was encumbered by [the complainant's] reluctance to perform." Dr. L also noted that x-rays revealed some minimal degenerative disc changes in all the levels of the complainant's spine, which Dr. L felt were compatible with the complainant's age. Dr. L's concluding remarks were as follows:

> I think that this patient's physical findings are at variance with the minimal x-ray evidence. Further, he manifests obvious functional overlay as noted by his reluctance to perform, over-reaction, and facial grimacing.
>
> At the same time, this examiner had the impression that the patient was depressed.
>
> ... because of his age, and language barrier, it is not likely that he could be retrained to perform a job commensurate with his symptoms. In fact, I think the situation is rather dismal for this patient, in terms of his future work potential. Rather, I think he should be considered by the Pensions Department for permanent disability, and reassessment ... I do not foresee the need for, nor the benefit derived by further investigation....

On September 28, 1979, Dr. B prepared the hospital Discharge Report. He noted that it was unlikely that the complainant could be retrained because of his physical and psychological disabilities. Dr. B also noted that the complainant had been given a three week supply of antidepressants. No specific psychiatric diagnosis was recorded.

In a memorandum dated October 11, 1979, the Claims Adjudicator responsible for the complainant's file recommended that the Board grant the complainant a 10% provisional psychiatric award for two years based on "... the serious nature of [the complainant's] back disability and his repeated recurrences and Dr. O's findings...." The Claims Adjudicator's supervisor concurred with this recommendation. However, Dr. J, a Board Surgical Consultant, reviewed the complainant's file on October 19, 1979 and reported:

> Noting work record over the years I would not be inclined to feel that any present psy problem is related to acc in 69. [sic]

A Board Psychiatric Consultant, Dr. F, obtained the complainant's file and requested that a Board Social Worker interview the complainant. That interview was conducted by Ms. T on November 28, 1979.

The complainant advised Ms. T that he was depressed because he was too young to be a pensioner and he was concerned about his economic future. He also complained of back pain which radiated down both his legs. The complainant described to Ms. T his work history and expressed his concerns about the lack of future prospects which he perceived for himself. He also added that he spent his days at home reading or watching television and that he often thought about his own country and how "unfortunate his life has been in Canada". Ms. T recorded that the complainant expressed anger about his Board claim and believed that he had been "pushed" to return to work in 1969. According to Ms. T, the complainant was "quite offended that he was referred for psychiatric consultation during his admission to H & RC and seems to have perceived that as an insult".

With respect to his financial situation, the complainant stated that his family did not have any outstanding debts but Ms. T reached the conclusion that his "... preoccupation with financial matters seems related to a general feeling of discouragement and hopelessness about his future." In her concluding remarks, Ms. T noted:

> The complainant ... looks sad and discouraged. At times, he was slightly irritable and tearful.... Certainly, at this time, I think the complainant quite sincerely considers himself totally disabled.

On December 14, 1979, the complainant's file was reviewed by the Committee for Assessment of Major Psychotraumatic Disabilities, consisting of Dr. F, Mr. Q, the Supervisor of the Board's Pensions Department, and Mr. P, a Supervisor from the Claims Department. The complainant's entire file was available to the conference members who noted, in particular, that although the hospital discharge report referred to the psychiatric aspect of the complainant's claim, no psychiatric problem was recorded in the discharge report per se. The conference members also noted Dr. O and Mr. S's remarks along with the social worker's report. The results of the conference were recorded by Dr. F in a memorandum which reads in part:

> It should be emphasized that this man has not demonstrated any secondary psychogenic problem throughout the 10 years after the accident until 1979 when he was examined by Dr. O who suggested 10 years after the accident that the claimant has developed a psychoneurotic reaction with an element of reactive depression triggered by the injury in 1969.
>
> It was agreed by the members of the conference that the above suggestion is indeed speculative and presumptuous and in a sense, contrary to the evidentiary standards in the development of the true post traumatic neurosis. Consequently, we recommend to deny psychiatric entitlement.... Please note also that

> this man has worked from time to time, but being a seasonal worker he was laid off frequently from construction work....

The complainant was not granted psychiatric entitlement.

On April 2, 1980, Dr. M, a Board Pensions Medical Officer, examined the complainant and recommended an increase in his organic pension award to 20%. Dr. M concluded his report with the comments:

> This very sad, depressed looking man would appear to have given up his enthusiasm for any type of employment.... If he attempts to do something his back hurts and he stops.... It would appear to be a fairly large psychogenic functional overlay and I would think his main problem is this.

In August, 1980, Dr. E referred the complainant to a psychiatrist, Dr. A, who reported that the complainant:

> ... complained of lower back pain radiating to both legs and sometimes up to the nape of his neck. He also has a variety of symptoms such as impaired sleep because of the stomach pains associated with the intake of analgesics and feeling depressed because of the pains.
>
> ... On January 19, 1979, he had an acute attack of lower back pain and he has not been able to work since.... He is aware that they (the Board) considered him "mostly depressed".
>
> Prior to 1969 he had no accidents, illnesses or operations.
>
> ... He has one daughter ... and his wife is working.... He represents a bit of financial and personal load on both of them.
>
> It is concluded that this gentleman might have a certain amount of degenerative disc disease of the lower spine.... There is clinical evidence of a certain amount of superimposed dramatization of symptoms compatible with a defence or hysterical mechanism not unusual in a man of his background and circumstances that without English or any skilled occupation has no chances or protection whatsoever to get a job as a common labourer again. He could do a light job but not without a better knowledge of English or some kind of training. The prognosis over the next year or two is poor.

Dr. A recommended Diazepam as a muscle relaxant.

Because the complainant had appealed his 20% pension award, Dr. H, a Senior Board Pensions Medical Advisor, examined him on December 11, 1980. Dr. H recommended that the Board confirm the complainant's 20% pension. Dr. H did comment that the complainant looked depressed at the time of the examination.

In January, 1981, the complainant attended an Appeals Adjudicator hearing because he was dissatisfied with the amount of his organic pension award. Prior to rendering a decision, the Appeals Adjudicator requested that the complainant be examined by a psychiatrist and interviewed by his social worker.

Mr. U, a Board Social Worker, interviewed the complainant on February 17, 1981. In his concluding remarks, Mr. U noted that:

> ... there has not been a significant change in the complainant's situation in the past year. He continues to feel "totally disabled" by his symptoms and is preoccupied with them. He has no insight into the emotional influences in his condition, although he does present with some depression and is at times harassable. It is evident that he did not begin suffering from emotional problems until having laid off work in 1979, some ten years after his initial accident. He had worked these ten years in apparent discomfort, but not undergoing any serious emotional problems.
>
> Other factors involved in his emotional state are his dependency and the over-protective attitude of his family.

Dr. K, a Board Psychiatric Consultant, examined the complainant on March 12, 1981. In his concluding remarks, Dr. K noted:

> It seems clear that the complainant is suffering from a moderately severe depression. The date of onset of this depression is difficult to determine but it seems clear that it is in part reactive to the constant back pain and his inability to find or even consider any type of employment. It appears well established that he suffers from degenerative disc disease of at least moderate severity. I am not sure whether this latter condition is considered by the surgeons to be related to his accident of almost 11 1/2 years ago. However, I do not feel that I can realistically relate his present depression to the accident.

The Committee for Assessment of Major Psychotraumatic Disabilities reconvened on April 23, 1981 prior to returning the complainant's file to the Appeals Adjudicator. The Committee concluded that it would uphold the denial of psychiatric entitlement in the complainant's claim.

In reaching their conclusion, the conference members noted in particular the social worker's February, 1981 report and Dr. K's March, 1981 opinion.

In May 1981, the complainant received an Appeals Adjudicator decision which denied his request for psychiatric entitlement. He appealed further and received an Appeal Board decision in July 1982 which upheld the prior decision.

As part of our preliminary investigation, a letter was written to the Assistant Secretary to the Board, requesting that he refer the complainant's file to Dr. K for his specific comments with respect to the complainant's request for psychiatric entitlement. I have given careful consideration to the Board's written response dated July 20, 1983.

During the course of this investigation, the Temporary Ombudsman, reached a tentative conclusion, pursuant to section 22(1)(b) of the Ombudsman Act that the Appeal Board panel in its decision dated July 23, 1982 "was unreasonable to have denied the complainant's request for psychiatric entitlement".

In a letter dated February 14, 1984, the Temporary Ombudsman advised the Chairman and the accident employer of his possible conclusion and recommendation. The Temporary Ombudsman pointed out that:

1) The available documentation revealed that the complainant has experienced several exacerbations of low back pain following his work injury on October 9, 1969. The Board recognized these exacerbations and granted the complainant compensation benefits intermittently over a period of approximately nine years. In addition, subsequent to the complainant's layoff from work in January 1979, his complaints of continuing back pain were again recognized by the Board. The complainant was granted temporary total disability benefits as well as a 10% increase in his organic pension award.

2) The first indication that a psychiatric aspect was playing a role in the complainant's disability was noted on March 2, 1979 by Dr. D, who described it as "significant". The first psychiatrist to examine the complainant, Dr. O, expressed the opinion that the complainant had "developed a psychoneurotic reaction with an element of reactive depression triggered off by his back injury of 1969 and repeated exacerbations."

3) Neither Dr. J nor Dr. F examined the complainant prior to recommending that the Board deny him psychiatric entitlement. The complainant was examined by Dr. K, who concluded that he could not "realistically relate [the complainant's] present depression to the accident." A review of Dr. K's memorandum revealed that he specifically linked the complainant's depression to his reaction to his constant back pain and "his inability to find or even consider any type of employment." Dr. K also noted that the complainant had degenerative disc disease of "at least moderate severity". However, Dr. K was "not sure" if the complainant's degenerative back condition was related to his accident.

It is my tentative opinion that the medical opinions establish that the complainant's work injury in conjunction with his exacerbations of back pain have produced a cumulative effect precipitating his psychotraumatic reaction and reactive depression.

4) It is apparent that prior to responding to our June 1983 letter of inquiry, the Board consulted with Dr. K, who reviewed his initial memorandum of March 12, 1981. Following his review, Dr. K stressed that his 1981 memorandum "also identified the pain as being caused by the complainant's degenerative disc disease." The Board's letter goes on to describe the complainant's degenerative disc disease as "non-compensable" and also describes it as "the source of the majority of pain he experiences." However, according to the Appeal Board decision, the complainant was granted entitlement for an aggravation of his degenerative disc disease. Furthermore, the Board recognized the complainant's constant organic back pain by paying him periods of compensation benefits and a pension award which was increased from 10% to 20% in 1981. Consequently, for the above reasons, and noting Dr. O's opinion, it is inexplicable to me that the Board should describe the majority of the complainant's back pain as non-compensable and also determine that his reactive depression is not related to his accident or its sequelae.

5) I am also aware that the Board's psychiatric policy referred to in its July 1983 letter reads, in part:

> Where it is evident that a diagnosis of a psychotraumatic disability is attributable to a compensable injury or its sequelae, entitlement

> shall be granted providing that the psycho-traumatic disability became manifest within five years of the injury or within five years of the last surgical procedure.

As pointed out in the Board's letter, the above "is considered to be a general rule to be taken into consideration in all cases where entitlement for a psychiatric condition is being claimed." However, it is my tentative opinion that since this is a general rule only, the application of the five-year clause should be waived. The complainant's claim for psychiatric entitlement should be judged on its own merit, having regard for all the available information, which reveals that since the original injury the complainant has experienced back pain resulting in periods of disablement and precipitating a psychiatric disability.

The Temporary Ombudsman tentatively recommended, "pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and grant the complainant entitlement to a psychological disability as being related to his compensable accident and back injury of October 9, 1969".

In a letter dated March 2, 1984, the Temporary Ombudsman received submissions to his 19(3) letter from the Controller, representing the accident employer. The Controller argued that following the complainant's accident and the termination of his benefits in 1971, he worked for lengthy periods, before his layoff from work in 1979. Mr. R maintained that the complainant had non-compensable degenerative disc disease at the time of his accident which, ten years later, resulted in depression and additional discomfort including leg pain. Mr. R reiterated Dr. K's opinion. Mr. R also contended that Dr. A's comments did not relate the complainant's psychiatric problem to his work accident. According to Mr. R, Dr. F and Dr. J's opinions regarding a relationship between the complainant's psychiatric condition and his accident held more weight than the Claims Adjudicator and Supervisor's opinions, because the physicians were experts in their fields.

In a letter dated April 25, 1984, the Appeal Board advised that it could not "agree that its decision was unreasonable" and therefore had decided not "to implement the Temporary Ombudsman's tentative recommendation".

I have considered this case in light of our investigation and the representations of the Board and the accident employer. Since I did not make the tentative recommendation, I felt that it was appropriate to quote the Board's response in detail, followed by my comments.

The Board's 19(3) Response #1

The first factor relied on by the Temporary Ombudsman is a statement of the complainant's recurrent episodes of back disability between his initial recovery in July 1970 and the first mention of non-organic symptoms, in 1979. It is significant, in the Appeal Board's view, that despite recurrences on 6 occasions during the intervening period, all medical reporting for these recurrences is completely devoid of any mention of psychological/psychiatric problems or symptoms.

My Comments #1

Throughout the course of our investigation, we acknowledged that the complainant neither displayed any psychiatric symptoms nor sought psychiatric treatment prior to 1979. This information, however, was not significant in itself to conclude that the Board was reasonable to have denied the complainant psychiatric entitlement.

The Board's 19(3) Response #2

The second factor identifies the first actual indication of the complainant's psychological difficulties, in March of 1979; some ten years after the initial accident and three years after the last exacerbation of low back disability. Reference is also made to Dr. O's report of September 5, 1979.

As Dr. D's report does not comment on the cause or origin of the psychological component, the Appeal Board does not consider this particular report to be relevant to the issue in dispute. On the other hand, Dr. O's report is clearly relevant, and was considered very carefully in the determination of the relationship between the psychological problems and the compensable injury. In this regard the Appeal Board draws your attention to the findings of the Rating Committee for Major Psychological/Psychiatric Disabilities. It was felt by the Committee members that Dr. O's opinion concerning causal relationship was "speculative and presumptuous and in a sense, contrary to the evidentiary standards in the development of the true post traumatic neurosis".

The Appeal Board accepted this assessment of Dr. O's report and therefore chose not to rely on the opinion of Dr. O in coming to its conclusion. In so doing, the Appeal Board accepted that the Committee had greater knowledge of the evidentiary standards used in determining cause/effect relationships in psychiatric disability cases, than did Dr. O. In the absence of

contrary evidence or research by the Ombudsman's office, the panel considers it reasonable to have chosen the Committee's views over those of Dr. O.

My Comments #2

By January 1979, the complainant, aged 51, had already experienced a number of low back exacerbations. It appears that the Board considered that the last exacerbation to the complainant's low back disability occurred in 1976. In my opinion, the complainant's layoff in 1979, which was accepted by the Board as compensable, was due to a further low back exacerbation.

By March 1979, the complainant displayed symptoms which Dr. D interpreted as depression and a significant psychological component. We acknowledged that Dr. D neither presented a specific diagnosis nor commented on the origin of the psychiatric component. However, we concluded that Dr. D's observation was relevant, as it was the first time that one of the complainant's treating physicians reported any psychiatric component, an observation which was made in the third month of the complainant's final layoff from work.

Eight months after the complainant's 1979 layoff, Dr. O expressed the opinion that there was a direct relationship between the complainant's work injury and exacerbations and the development of his psychoneurotic reaction with an element of reactive depression.

In my view, the Appeal Board's sole reliance on the Committee's recommendation is inappropriate. The Committee failed to address the important aspect of sequelae which is a part of the Board's own policy concerning psychiatric entitlement. The policy provides for entitlement when the sequelae of an injury leads to a psychiatric disability. This aspect of the policy was addressed by Dr. O, a qualified psychiatrist retained by the Board. It was not specifically addressed in the Board's response nor by its own Committee.

The Board's 19(3) Response #3

> In respect of the third factor, the Appeal Board submits that the fact that neither Dr. J [n]or Dr. F had examined the complainant personally, does not place them at a disadvantage in rendering a medical opinion on the causal relationship between the psychological problem and the accident. Instead, the Appeal Board submits that a medical opinion based on documented evidence, including objective and subjective findings elicited on actual examination by other physicians, is no less valid than a medical opinion from the examiner himself. In other words, the Appeal Board is satisfied that medical

findings as elicited through actual examination and subsequently documented, are no less valid or less useful in developing a medical opinion, than findings elicited firsthand.

As far as Dr. K's assessment is concerned, it must be kept in mind that the doctor participated in the conference on this case and, as a member of the conference, agreed that the psychiatric problem was not attributable to the accident. It would therefore be misleading to quote Dr. K in isolation from all of the evidence.

The Temporary Ombudsman comes to the tentative conclusion that "the complainant's work injury in conjunction with his exacerbations of back pain have produced a cumulative effect precipitating his psychotraumatic reaction and reactive depression".

With due respect for the Temporary Ombudsman, the Appeal Board considers this to be an opinion expressed by a person not trained in psychiatry, on a matter essentially medical in nature. Furthermore, while acknowledging the opposing psychiatric opinions, the Temporary Ombudsman appears to have accepted those favouring a relationship without attempting to construct a scientific basis for doing so. On the other hand, the Rating Committee has considerable experience in the assessment of these types of cases, and the medical members of the Committee are well versed and up to date on the current and relevant scientific data which generally supports the conclusions reached.

My Comments #3

It would appear to me that reviewing documented evidence in conjunction with actual examinations, especially in this case, would have been appropriate because the complainant's 1979 compensable low back disability resulted in a psychiatric problem after years of exacerbations. Although both Dr. F and Dr. J commented on the complainant's work history from 1969, their memoranda do not indicate that they noted, in particular, the number of exacerbations he experienced over the years. Perhaps an examination would have elicited a clearer understanding of the effects of those exacerbations on the complainant's psychological disability.

I am aware that on Thursday, September 13, 1984, the Assistant Secretary advised the Select Committee on the Ombudsman that the Board had changed its practice with respect to reviewing claims for psychiatric entitlement. Currently, Board Psychiatric Consultants do not rely simply on a review of the available documentation. I must assume that this

change in practice occurred because the Board had concerns about relying on psychiatric evaluations conducted on the basis of a claim review only.

In my view, the Temporary Ombudsman did not deal with Dr. K's evidence in isolation. Rather, this evidence was noted as being separate from that of the Rating Committee for Major Psychological/Psychiatric Disabilities. According to the Board's own records, Dr. K did not examine the complainant until 1981, and he did not attend either of the Committee meetings.

The Appeal Board also related that the Temporary Ombudsman, a layperson, proposed a tentative recommendation based on opinions which favoured a relationship between the complainant's psychiatric condition and his work accident and history without constructing "a scientific basis for doing so." My Office's mandate is to review Appeal Board decisions and determine on the available evidence whether a reasonable decision has been made. To reach any conclusion, it is appropriate not only to review the actual material contained in a Board claim file, but to review the existing Board policies. In my opinion, the evidence is sufficiently clear to support a relationship between the complainant's psychiatric disability and the sequelae which developed because of his compensable injury.

The Board's 19(3) Response #4

> The Temporary Ombudsman finds it "inexplicable" that the Board should find the majority of the complainant's back pain as non-compensable. By way of explanation, the Appeal Board submits that the complainant's degenerative disc disease was not caused by the accident. In that sense, pain emanating from the degenerative condition cannot be considered compensable either. As you know, the claim was initially accepted for a lumbosacral strain. The diagnosis of degenerative disc disease was not made until approximately two years later (Dr. G, June 29, 1971). The strain recurred on several occasions, aggravating the degenerative disc disease each time. On each occasion, however, the recurrent strain subsided as did the associated symptoms of the aggravated degenerative disc disease. The 20% award that the complainant now receives is an attempt on the Board's part to recognize a propensity for recurrent strains and the aggravating effect it has on the underlying degenerative disc disease. It does not, however, attempt to recognize all of the symptomatology arising out of this progressive condition, as the condition is clearly not caused by the work injury. For instance, changes in the cervical spine as identified by Dr. N in his report of December 20, 1983, cannot in any way be considered related to the compensable problem.

My Comments #4

I am confused by the Board's statement that the 20% pension award was made to compensate the complainant due to his "... propensity for recurrent strain and the aggravating effect it has on the underlying degenerative disc disease".

It is my understanding, based on numerous previous comments by the Board, that pension awards are based on the permanent loss of bodily function. The organic award was granted to the complainant in recognition of a permanent 20% loss of total bodily function resulting from his compensable accident. Recurrent strains have been compensated by temporary total, or temporary partial benefits. Furthermore, I have noted that in the Appeal Board decision dated July 23, 1982, the Board recognized, and accepted as compensable, an aggravation of the complainant's degenerative disc disease. The Board, therefore, has implicitly accepted not only back pain which resulted from a compensable injury but also back pain because of the degenerative process. I am therefore of the opinion that the psychiatric condition which flowed from the complainant's back pain is also compensable.

The Board's 19(3) Response #5

> The "general rule" quoted by the Temporary Ombudsman, should in his view, be "waived". This guideline was developed on the basis of independent scientific research and data well known in the medical community. It is an established medical fact, as opposed to medical opinion, that post traumatic neuroses develop within five years of precipitating trauma. In the vast majority of cases the neurosis develops within 18 months. I am aware that in February 1981, your staff requested and received a large volume of research data from Dr. F, the Board's Consultant Psychiatrist. All of this data supports the Board's policy with regard to the adjudication and evaluation of claims for psychiatric disability. This material, comprising in excess of 100 papers and documents, should be considered as forming a part of the Board's response to the Temporary Ombudsman's suggestion that the five year guideline be waived. At the same time, the Appeal Board would welcome an opportunity to review any research data you may be aware of, that is similar in scope and depth but which would tend to establish that either the five year guideline is unreasonable generally, or alternatively, that the circumstances evident in this case are such that failure to waive the five year guideline would be unreasonable.

My Comments #5

On July 20, 1984, my Office received from the Board 108 medical papers and studies. As you know, my staff does not include a resident psychiatrist nor did I think that it was appropriate to retain a psychiatrist to review the Board's medical submissions. Instead, the material was reviewed by members of my investigative staff. The results of the review revealed that the topics of the papers ranged from "Psychotraumatic Reactions" to "Occupational Health in Europe". The papers were published between 1953 and 1983. Furthermore, the papers submitted by the Board, in this case, do not address what I see to be the crucial issue: whether or not the sequelae of a compensable injury, demonstrated by exacerbations of back pain, may lead to the development of a psychiatric disability/condition.

I am not prepared to contend or dispute that the existing medical literature and research may in fact reveal that a neurosis usually develops within 18 months to five years. However, given the facts of this case, I am not persuaded by the above general statement. In this case, the medical evidence indicates that in 1979 the complainant was suffering from a reactive depression which was related to the compensable injury and the years of exacerbations.

The Board's general policy with respect to compensation for psychiatric disabilities recognizes that such disabilities will usually be apparent within five years of the injury or last surgical procedure. In my opinion, that part of the Board's policy should not prevent entitlement in a case where the disability is clearly and directly related to an injury and its sequelae. In the present case, it is my view that such a relationship has been established.

Recommendation

It is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that it was unreasonable for the Board to have denied the complainant's claim for psychiatric entitlement. I recommend, therefore, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision of July 23, 1982 and grant the complainant entitlement for a psychological disability which manifested in 1979, and is related to his compensable back injury and its sequelae.

This recommendation was included in a report to the Chairman dated January 31, 1985.

The Board had not responded to the report and recommendation by March 29, 1985. I therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter

to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 18

This complaint against the Workers' Compensation Board was brought to the attention of this Office by a letter received on May 18, 1983. The complainant contended that the Appeal Board was unreasonable to confirm a 50% permanent disability award for his back disability. In a decision dated May 6, 1983, the Appeal Board found that the 50% pension adequately reflected the complainant's low back disability and that the complainant was not entitled to temporary total disability benefits after April 28, 1982.

On June 8, 1983, the Chairman of the Workers' Compensation Board was notified of our intention to investigate the complaint in accordance with the requirements of the Ombudsman Act. The Chairman was invited to provide a statement of the Board's position in relation to the complaint. On behalf of the Chairman, a reply was received from the Assistant Secretary, stating that the Board did not wish to make a statement at that time. Following receipt of this letter, the complaint was assigned to a member of my investigative staff. During her investigation, the investigator conducted a thorough review of the complainant's Workers' Compensation claim file supplied by the Board, as well as carefully considering the relevant legislation and policies of the Workers' Compensation Board in relation to the issue.

Our investigation to date has revealed that on January 31, 1963, the complainant, employed as a labourer with the accident employer, slipped on some grease on the floor as he turned to place a heavy tub on to a machine, lost his balance, and fell to the floor. The complainant received immediate medical attention for a twisting sprain to his lower back. The Board granted temporary total disability benefits from February 1, 1963 until February 25, 1963 and from May, 1963 until October, 1963 when the complainant returned to work at the accident employer.

From that time until 1982, the complainant received various periods of temporary total disability benefits for further back injuries in 1964 and 1968 and for continuing exacerbations. The employer provided the complainant with light duties whenever he was able to work.

The complainant was assessed by the Workers' Compensation Board on November 1, 1972 for a permanent disability award. He was granted a 10% pension from 1963 until 1970 and 20% from December, 1970. This was increased to 40% in February, 1974.

The forty per cent award was confirmed by the Board following reassessments in 1976, 1979, and 1980. The Board denied entitlement for psychological disability on the grounds that the complainant's emotional problems stemmed from his traumatic experiences as a prisoner of war during World War II and the Korean War.

Following an exacerbation in September 1981, the complainant's condition deteriorated. He discontinued work on September 15, 1981, and elected early retirement from the accident employer on November 1, 1981. All the examining physicians acknowledge that he had a significant physical disability and his previous work history indicates that had there not been an increase in his pain, the complainant would likely have continued working at the accident employer as he had in the past.

The complainant applied for an increase in his permanent disability award on the basis that his condition had deteriorated. After being reassessed by Dr. A on June 18, 1982, his pension was increased to 50%, on the basis that his condition had worsened following his previous examination on March 3, 1980.

The complainant appealed the 50% pension; however, the Appeal Board ruled that the 50% rating adequately represented the amount of organic disability the complainant had suffered.

During the course of our investigation, the Temporary Ombudsman formed the view that it might be open to him to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that:

> ... the Appeal Board was unreasonable in confirming the 50% permanent disability award. It is my tentative opinion that the medical evidence indicates that the complainant has virtually no flexibility in his spine and therefore his award should be at least in keeping with the minimum guideline of 60% provided for by the Ontario Rating Schedule. It is also my view the award should have reasonably exceeded those guidelines because of the complainant's inability to perform even the lightest competitive employment as verified by his treating physicians and employer.

In a letter dated February 13, 1984, the Temporary Ombudsman advised the Chairman of the possible conclusion and his consequent possible recommendation. In support of the possible conclusion and recommendation he pointed out that the complainant's medical condition did deteriorate significantly after 1981. In support of that statement, the Temporary Ombudsman referred to three medical reports contained in the Board's claim file including the June 21, 1982 report of Dr. A, a Senior Medical Adviser at the Workers' Compensation Board. Dr. A had stated:

> ... he does have significant disability on an organic basis. He was not able to stand erect and is in the forward flexed position. There is no movement of the spine for flexion, extension or lateral bending.

Dr. B, an orthopaedic surgeon, reported to the life insurance company on June 10, 1982 as follows:

> ... from an insurance aspect, this man must be considered totally disabled and will likely remain so for the foreseeable future.

Dr. C, the complainant's family physician since 1976, reported on October 15, 1982 that:

> ... the complainant has tried hard to continue working over the past several years in spite of his back pain. In his present condition, he is, in my opinion, not capable of performing even light work.

The Temporary Ombudsman also dealt with the question of entitlement for a psychological disability, which was noted by the Appeal Board. He concluded that the complainant's psychological condition, although operative, was not disabling, nor should it have been a factor in a determination of his permanent disability.

The Temporary Ombudsman's letter of February 13, 1984 went on to state that it may be open to him to:

> ... recommend, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and award the complainant a permanent disability rating in accordance with all the medical and other evidence which will reflect the true nature of his disability bearing in mind the minimum guidelines.

The Chairman's response to that letter, dated April 24, 1984 stated in part that:

> Having carefully reviewed all of the evidence on record in the context of the Temporary Ombudsman's submissions and the Ontario Rating Schedule, the Appeal Board cannot agree that its decision was unreasonable.

With regard to the Temporary Ombudsman's statement that the medical evidence establishes that the complainant has virtually no flexibility in his spine, the Chairman stated that the complainant has limited movement in his spine. Dr. A had reviewed her memo dated June 21, 1982 and stated that, "The sixth line of this paragraph should have

been qualified to indicate that there was no movement of the lumbar spine. It was never my intent to indicate that there was 'total immobility of the whole spine', as such a statement would be incorrect." (Emphasis added)

However, the Chairman went on to note that, although the complainant's spine was not completely immobile,

> ... it is clear that there is evidence of a severely limited movement in the lumbar spine. The Ontario Rating Schedule refers to a totally immobile spine as a guide only. In other words, such a condition would never be seen in the context of an industrial injury. Total immobility, with fusion of all of the vertebrae, might occasionally be seen in progressive disorders such as Marie-Strumpell spondylitis. Obviously, the complainant does not have total immobility of the entire spine and the 50% award, representing in excess of 80% of total immobility of the entire spine from occiput to sacrum, in the Appeal Board's view is reasonably proportionate to the amount of restriction he does have.

With regard to the Temporary Ombudsman's comment concerning the complainant's inability to perform even the lightest competitive employment, the Chairman stated:

> ... the Appeal Board points out that section 43(1) of the Workers' Compensation Act requires the Board to estimate the impairment of earning capacity "from the nature and degree of the injury" only.

The Chairman concluded that:

> In view of all of the above, the Appeal Board will not take any steps to implement the Temporary Ombudsman's tentative recommendation.

Before reaching a final conclusion in this case, I have again carefully considered all of the factors involved, as outlined in the Temporary Ombudsman's letter of February 13, 1984 and reflected upon the Chairman's response to that letter.

I note that there is no disagreement between us on the medical evidence. I agree with the Chairman that the medical reports indicate severely limited movement of the lumbar spine. It is with regard to the question of compensation for the complainant's back disability that there is disagreement. The Chairman states that since the complainant does not have a totally immobilized spine, the 50% pension he receives is adequate compensation. I agree with the Chairman when he states that the Ontario

Rating Schedule refers to "a totally immobilized spine as a guide only." However, it is my opinion that the term "guide" should be interpreted in line with the Board's Policy Directives which are as follows:

Directive 2(1)

> That the rating schedule be accepted as a guide for minimum levels for specified disabilities.

Directive 2(2)

> That in every case emphasis must be placed on the individual factors being appraised and appropriate allowances made.

Although the complainant does not have a totally immobile spine, there are individual factors that argue for an increase in his permanent disability award. He has extremely limited movement in his spine as a result of an industrial accident. The Board itself stated that one would never find a totally immobile spine resulting from an industrial accident, but only from progressive disorders. From the time of his first accident in 1963 until 1981, the complainant continued working at the accident employer until 1981, whenever he was able and his employer several times gave evidence to the Board that the complainant was an excellent employee. I note that the Claims Adjudication Branch Procedures Manual, Document No. 33/20/01 states that, "Permanent disability cases which do not meet the general criteria should be individually judged and dealt with equitably and fairly, having regard for all the circumstances." the complainant's is a case where the doctrine of equity and fairness should be applied to grant him an increase in his pension.

The Chairman further commented, "The Appeal Board points out that section 43(1) of the Workers' Compensation Act requires the Board to estimate the impairment of earning capacity 'from the nature and degree of the injury' only." Again, I refer to the Board's Policies and Administrative Directives which state in Directive 1(2) and 1(3) that:

> (2) The Schedule is designed to show in percentages the approximate impairment of earning capacity in an average unskilled employee.
>
> (3) It is to be used only as a guide always having regard to whether the award adequately compensates the employee for his loss of earning capacity either at his own or some other suitable occupation.

Directive 1(3) suggests that we can also look to the complainant's loss of earning capacity. In the complainant's case, he would likely have continued working at this workplace of 29 years if the pain from his injury had not increased.

Accordingly, it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of May 6, 1983 was unreasonable to confirm the 50% permanent disability award. The Policy Directives indicate that the Ontario Rating Schedule is to be applied as a guide for calculating minimum levels for disabilities. The Board is not prevented from granting any percentage above the specified minimum level; that is, the schedule is a floor and not a ceiling for benefits. The medical evidence and the individual factors of the complainant's case argue for an increase in his permanent disability pension beyond 50%.

It is, therefore, my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision, and grant the complainant an increase in his permanent disability pension in accordance with all the medical and other evidence to reflect the true nature of his disability.

My conclusion and recommendation were contained in a report dated December 4, 1984. On March 20, 1984, the Chairman of the Board advised me that the Board did not intend to accept my recommendation. In denying the recommendation, the Board relied on an early finding of the Select Committee on the Ombudsman that the Board was entitled to rely on its own medical experts with specialized knowledge in assessing the amount of permanent disability awards.

I did not consider this to be an adequate or appropriate response to my recommendation and on March 31, 1985, notified the Premier of my findings. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 19

The complaint against the Workers' Compensation Board was brought to the attention of this Office in a letter, dated December 6, 1983, from his representative. The complainant contended that an Appeal Board decision of April 25, 1983 was unreasonable to find that his 46% permanent partial disability award for organic disabilities to the low back, neck and left ankle, and his 30% three-year provisional psychotraumatic award properly reflected the degree of disability resulting from his various accidents. He also contended that in its decision of October 27, 1983, the Appeal Board was unreasonable to find that the

information submitted by his community legal worker on September 1, 1983 would not cause it to vary, amend or revoke its decision of April 25, 1983 denying an increase in his total permanent disability award, or to grant a new hearing.

On January 5, 1984, the Chairman of the Workers' Compensation Board was notified of our intention to investigate the complaint in accordance with the requirements of the Ombudsman Act. The Chairman was invited to make a statement, if he wished, of the Board's position in relation to the complaint. In a response dated January 12, 1984, the Board declined to make a statement at that time. Our file on this complaint was assigned to a member of my investigative staff. During her investigation, the investigator conducted a thorough review of the complainant's claim file supplied by the Board, and carefully considered the relevant legislation, policy and practices of the Workers' Compensation Board in relation to the issue.

The investigation carried out by my Office has revealed that on April 18, 1963, the complainant had the first of a number of accidents which led to his being granted partial disability awards for organic disability. By April 23, 1982, the quantum of these awards reached 30% for his low back, 10% for his neck, and 6% for his left foot.

By September 10, 1980, it had become apparent that the complainant's psychological condition had been adversely affected by his physical disabilities, and he was assessed by Dr. A, a Board psychiatrist. Dr. A was of the opinion that the complainant's multiple injuries, loss of physical prowess, and resultant loss of self-esteem impaired his ability to function. A 15% non-organic partial disability award was granted.

On September 30, 1981, Dr. B, the complainant's attending psychiatrist, reported that he had first seen the complainant on May 27, 1981. Dr. B wrote:

> He has suffered a tremendous loss of self-esteem in not being physically capable to work to support and raise his wife and children properly. He has felt increasingly more depressed, lost, confused, and often "wanting to just go home, lie down and close his eyes and to feel free from people".
>
> With his current state of physical and resultant psychiatric disability:
>
> (1) I do not feel that it is reasonable to expect the complainant to be able to return to the work force, even in a light duty capacity.

> (2) the complainant, in addition to physical pain, suffers from a persistent depression and anxiety, that, in my opinion, are a direct result from his numerous work injuries and their physically disabling sequelae.
>
> (3) the complainant's psychiatric state has not altered appreciably in the past year, despite individual and conjoint psychotherapy sessions (with his wife), and additional psychotropic medication which he requires under my supervision, ...
>
> It is my considered opinion that the complainant should be awarded at least 55% (instead of 15%), for his psychological disability, in addition to his allowance for his physical disabilities.

At an Appeals Adjudicator hearing on December 2, 1981 it was recorded that the complainant had worked at a lumber company for a few hours a week during the summer of 1981 but had to stop the work because of his disability, and that he kept pigeons at home as a hobby. Subsequent to the hearing, the Appeals Adjudicator requested a review of the level of psychological disability, noting that there was no evidence of pre-accident psychological disability.

The complainant was examined by Dr. C, a psychiatrist, on January 18, 1982. Dr. C wrote:

> I feel that the complainant is a man of bright normal or superior intelligence, who has been subjected to very severe and traumatic emotional hardship from his earliest years, but who has tried over a long period to overcome the difficulties with only moderate and temporary success. I think it is obvious that he has suffered from a severe and debilitating state of depression and anxiety, related to his compensable accident and his subsequent "loss of face" due to his inability to provide for his family, and aggravated by the out spoken criticism of his fellow Macedonians. I felt that he was a reliable informant and did not in any way attempt to magnify or dramatize his misfortunes. I do not see much prospect of his returning to the work force and would rate the degree of his non-organic disability at 30%. I would suggest that his rating be reassessed within three years.

On June 18, 1982 awards of 30% for a non-organic disability to be reviewed in three years, 30% for the lower back, 10% for the neck and 6% for the left foot, were allowed. The Appeals Adjudicator did not accept the claim of total disability.

On January 18, 1983 Dr. B wrote:

> It is my considered opinion that the complainant is not yet well enough physically or mentally to engage in a rehabilitation programme, or, in any part time employment. The complainant is not physically and psychologically capable of any form of sustained light work. It appears to me, that because of the chronicity of his physical disability and poor response to treatment of his depression to date, the complainant will most probably remain permanently and totally disabled.

On March 29, 1983 an Appeal Board hearing was held. In a decision dated April 25, 1983 the Appeal Board noted and accepted that the complainant's psychotraumatic disability had decreased, that the disability was granted on the basis of aggravation, and there was no evidence that the complainant's compensable condition had deteriorated. The Appeal Board concluded that the 46% disability award (low back, neck and left ankle) and the 30% psychotraumatic award properly reflected the degree of the complainant's disability as related to his industrial accidents. The Appeal Board further concluded that it was not established that the complainant was totally permanently disabled.

On September 1, 1983 the complainant's representative asked that the Appeal Board decision of April 25, 1983 be reconsidered and a new hearing arranged, or that the complainant's disability be reviewed, perhaps by a Major Psychogenic Rating Committee. In arguing against the Appeal Board decision, the complainant's representative noted that the three reasons provided by the Appeal Board were incorrect. First, the Appeal Board had noted that the complainant's psychotraumatic disability had decreased, even though the only evidence pertaining to his psychological disability subsequent to the Appeals Adjudicator's decision was a letter of January 18, 1983 from Dr. B, who gave his opinion that the complainant would probably remain permanently and totally disabled. Second, the Appeal Board had noted that the psychotraumatic disability was granted on the basis of aggravation, although nowhere in the file is there any evidence that that was the basis; to the contrary, the Appeals Adjudicator noted that there was no indication of pre-accident psychological disability. Third, the Appeal Board had noted there was no evidence to prove that the complainant's condition had deteriorated to warrant disability awards greater than 76%. The complainant's representative countered that the issue of deterioration was irrelevant since the complainant was totally disabled and had been for some time, and the central issue was whether the complainant was entitled to more than 76%.

On October 27, 1983 the Appeal Board decided that the complainant's representative's letter of September 1, 1983 was not information

that would cause it to vary, amend, or revoke its decision of April 25, 1983 or to grant a new hearing.

During the course of my investigation, I formed the view that it might be open to me to conclude that the Appeal Board was unreasonable to conclude that the complainant was not totally disabled, and that the 46% organic and 30% psychotraumatic disability award properly reflected the degree of his disability as related to his industrial accidents.

In a letter dated August 1, 1984, I advised the Chairman of the possible conclusion and my consequent possible recommendation. In support of the possible conclusion and recommendation, I pointed out:

> I have reviewed the Appeal Board's three reasons for denying the complainant's appeal. The first, that his psychotraumatic disability had decreased, appears to be incorrect. The last two psychiatrists' reports on file (from the Board Consultant and the attending psychiatrist) described him as disabled psychologically. They did not report a decrease in his psychotraumatic disability.
>
> The second, that the psychotraumatic disability was granted on the basis of aggravation, also appears to be incorrect. The Appeals Adjudicator specifically noted that there was no indication of pre-accident psychological disability. The word "aggravated" was used in Dr. C's report of January 19, 1982 but referred to aggravation of the complainant's depression and anxiety by criticism of his peers, not to aggravation of a pre-existing condition by a compensable injury.
>
> Third, the Appeal Board noted that there was no evidence to establish that the complainant's condition had deteriorated to a point where more than 76% should be paid. The reference to a deteriorating condition appears to be a "red herring" since the appeal was based on the argument that the 76% was insufficient to begin with, not that it had been adequate at one time and was now insufficient because the complainant's condition had deteriorated.
>
> These three points were identified by the complainant's representative in a letter of September 1, 1983. The letter was sent to the Appeal Board asking it to reconsider its decision of April 25, 1983. An Appeal Board decision dated October 27, 1983 stated the information submitted would not cause it to reconsider its decision.
>
> While the complainant's representative's letter did not provide new evidence for the Board to consider, nevertheless it demonstrated that the reasons given by the Appeal Board were questionable and provided a reasonable argument against the

decision. Given a reasonable argument, the Appeal Board ought to reconsider its decision.

My letter of August 1, 1984 went on to state that it might be open to me to recommend that the Appeal Board should revoke its decision of April 25, 1983 and recognize that the complainant is totally disabled, and grant him a permanent disability award to properly reflect his total disability resulting from his industrial accidents.

The Chairman's October 10, 1984 response to my letter of August 1, 1984 stated in part:

> On Page 4 of your letter, you suggest that the Appeal Board was not correct in concluding that the complainant's psychotraumatic disability had decreased. The panel recalls very clearly that at the hearing, the representative conceded that the complainant's behaviour had improved.... The social worker's report of December 30, 1981 is also revealing, indicating that:
>
> > "At this time the complainant says he feels 'better' and that he tries 'to be happy'. He appears to have gone through some kind of acute episode in May, but now seems to be functioning better. He seems to be benefiting from his psychiatric treatment and has gained a fair amount of insight".

When the complainant's representative confirmed at the Appeal Board hearing that the complainant's behaviour had improved, his testimony, as recorded on page 25 of the Appeal Board hearing transcript, was similar to that of the social worker in describing the complainant as feeling and functioning better. The complainant's representative was recorded as saying:

> The situation appears to be deteriorating as time goes on, unfortunately, and not improving that much although there was, it seems, when he started getting to Dr. B, things improved then, that's for sure, because there was all sorts of peculiar and bizarre behaviour being exhibited before that.
>
> I think the record discusses that. I think the social worker has commented on times when he basically ran away from home, and that has improved, but the overall situation couldn't be said that there is much hope at the end of the tunnel here.

In both cases, that of the complainant's representative and the social worker, the comparison was with a previous time when the complainant had been displaying bizarre behaviour in which he became suspicious of his

family and hid in his garage. Both the representative and the social worker noted that the complainant was improved in that he was no longer displaying bizarre behaviour. However, the disappearance of florid symptoms and the gaining of insight do not necessarily mean that the complainant's disability had decreased to a level that would render him capable of returning to employment.

The Chairman's October 10, 1984 letter also stated:

> Furthermore, the panel noted that he had returned to work, albeit for a short duration, during the summer of 1981. This suggested to the Appeal Board that he was not totally disabled.

At the Appeals Adjudicator hearing on December 2, 1981, it was noted that the complainant worked in a lumber yard for a few hours per week for two to three months, earning approximately $800. However, testimony indicated that he was unproductive and had to leave because of his disability. The social worker's report of December 30, 1981 noted that the complainant attempted to return to work picking apples but made very little money because his productivity was low. The complainant then attempted to work as a dishwasher but was fired for medical reasons. It would appear that the complainant's attempts to find employment did not, in fact, indicate a decrease in his disability. To the contrary, they demonstrate quite clearly that, although he was willing to try, he was incapable of holding down a job.

The Chairman's October 10, 1984 letter went on:

> Finally, the panel suggests that careful attention be given to the reports of Dr. D, Dr. A and Dr. C as further support for the panel's finding that the psychiatric condition appears to have undergone some improvement.

I note that on September 16, 1975, Dr. D diagnosed a chronic anxiety depression and rated the complainant's disability at 10% for an ulcer and 15% for the chronic depression. On September 10, 1980, Dr. A rated the complainant's non-organic disability at 15%. On January 18, 1982, Dr. C diagnosed severe, debilitating depression and anxiety and rated the complainant's disability at 30%. A progression from a 15% to a 30% disability rating does not indicate improvement on any scale.

The Chairman's letter of October 10, 1984 went on to say:

> The Appeal Board also had regard for the complainant's personal history, which included his father's suicide, an ulcer condition, a deprived childhood, a "forced" marriage, all of which were factors which contributed to his personality development. Dr. A and Dr. C stated that the "loss of face" subsequent to the accident, aggravated by the criticism of fellow

> Macedonians, should not be considered compensable. While admittedly this "aggravation" occurred after the compensable injuries, it was nevertheless a completely non-compensable entity and, if sufficient to increase the level of disability, should not be reflected in the benefits awarded under the Workers' Compensation Act. Notwithstanding this, the panel points out that the complainant's award for psychiatric disability was not reduced by reason of any pre-existing or underlying propensity for the development of psychiatric problems.

Neither Dr. A nor Dr. C stated that the complainant's loss of face should not be considered compensable. Dr. A wrote on September 10, 1980:

> The patient has been rated as having a 35% organic impairment as of May 1980. In addition, it is my opinion that the multiple nature of the injuries and the resultant loss of self esteem due to loss of physical prowess have created a psychological factor which further impairs the man's ability to function.
>
> I recommend that psychiatric entitlement be accepted....

Dr. C wrote on January 19, 1982:

> I think it is obvious that he has suffered from a severe and debilitating state of depression and anxiety, related to his compensable accident and his subsequent "loss of face" due to his inability to provide for his family, and aggravated by the out spoken criticism of his fellow Macedonians.

Both psychiatrists noted the complainant's unfortunate history, but were clear that his psychotraumatic disability was a consequence of his compensable accidents, not of his personal history in general.

The Chairman's letter of October 10, 1984 also stated:

> Your final concern dealt with the panel's finding that there was no evidence to establish a deterioration in the complainant's condition beyond the 76% permanent disability level recognized. The Appeal Board submits that it <u>reasonably</u> reached this conclusion on the evidence available, which included the opinion of physicians in the Medical Branch. Implicit in this, is the conclusion that the 76% award was an adequate reflection of disability residual to the complainant's compensable injuries.

The Appeal Board makes no mention of the evidence of Dr. B, the complainant's attending psychiatrist, who wrote on January 18, 1983 that

the complainant would most probably remain permanently and totally disabled. Dr. B's report would appear to be strong evidence that the complainant was disabled more than 76%.

The Chairman's October 10, 1984 letter also stated:

> One final point stressed by the Appeal Board, is that the panel met with the complainant on a person-to-person basis, and therefore considers itself at an advantage in considering the broad question of the extent of his disability. On the basis of the evidence and their observations, the Appeal Board was not convinced that the complainant was totally disabled. The Appeal Board notes that your tentative conclusion and tentative recommendation are based simply on a review of a photocopy of the Board's file.

The evidence referred to in the letter appeared to be that of the complainant's representative, the social worker, Dr. D, Dr. A, Dr. C, and Dr. E, a general surgeon. In light of the foregoing comments about the medical evidence presented, it might seem that the Appeal Board reached incorrect conclusions about most of the evidence. Of even greater importance is the total lack of reference by the Appeal Board to the opinion of Dr. B. Particularly in light of the strong opinion rendered by Dr. B that the complainant was totally disabled, it is surprising that the three lay members of the Appeal Board panel would consider their person-to-person meeting with the complainant at the hearing as giving them an advantage in considering the extent of his disability.

The final paragraph of the Chairman's October 10, 1984 letter stated:

> On the basis of the investigation thusfar conducted by your office, the Appeal Board cannot agree that its decision was unreasonable, and consequently, the panel does not intend to give effect to your tentative recommendation.

On November 26, 1984, Dr. B wrote another report which was sent to the Board by the complainant's representative. The letter read in part:

> Psychologically and emotionally he has reached a chronic "bottomed-out" state. His major depression continues to be unimproved and chronic. At times he entertains suicidal ideas which he fights, because of his Christian religion. He totally lacks self-esteem, and feels useless and emasculated because of his inability to work.
>
> In my opinion, the complainant has not improved physically or emotionally, and I cannot see how it would be possible for him

> to ever undertake any form of employment. Whenever anyone has criticized him because of this, he becomes close to the brink of an acute psychotic breakdown with paranoid features. ... the complainant's physical, mental, and social failures,... he regards as shameful and ... he feels very sensitive [about them]. His back and both legs continue to be chronically severely painful and he is certainly not able to "enjoy life."
>
> It is therefore, my considered opinion, that the complainant is a legitimate candidate for, and should be awarded a 100% pension at this time, and for the remainder of his life.

Before reaching a final conclusion in this case, I have again carefully considered all of the factors involved, as outlined in my letter of August 1, 1984 and reflected upon the Board's response to that letter. I am of the view that the Chairman's response does not constitute a significant refutation of the information outlined in my letter of August 1, 1984, in support of my possible conclusion and recommendation. There is no evidence that the complainant's psychotraumatic disability had decreased to a level which would permit him to return to work; the Board psychiatrists did not consider the complainant's loss of face to be non-compensable; and, most importantly, the Appeal Board apparently failed to consider Dr. B's evidence supporting the complainant's claim of total disability when it concluded that the 76% award was an adequate reflection of disability residual to his compensable injuries.

Accordingly, it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of April 25, 1983 was unreasonable to conclude that the complainant was not totally disabled, and that the 46% organic and 30% psychotraumatic disability award properly reflected the degree of his disability as related to his industrial accidents. It is, therefore, my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board should revoke its decision of April 25, 1983 and recognize that the complainant is totally disabled, and grant him a permanent disability award, with arrears to February 27, 1981, three months prior to when he first attended Dr. B, to properly reflect his total disability resulting from his industrial accidents.

This recommendation was included in a report to the Chairman dated January 21, 1985.

The Board had not responded to the report and recommendation by March 29, 1985. I therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

APPENDIX A

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NUMBER	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF THE ENVIRONMENT			
11	10	That the Minister cancel his decision to accept the adjudicator's recommendation not to pay the complainant's claim for interest; that the Minister accept and consider the claim as one properly made under the Public Works Creditors Payment Act.	12, Rec. 2	That the Minister of the Environment accept in principle that the Crown may, in the appropriate circumstances, pay a claimant interest due pursuant to a term of a contract with a contractor; that the Minister consider the merits of the complainant's claim for interest owing on the principal amount in question and formulate a decision whether or not to pay the claim.	The Deputy Minister has advised the Select Committee and the Ombudsman that he has considered the viability of paying interest and legal costs to the complainant and concluded the Crown should not pay the interest or legal costs in this matter.
		MINISTRY OF GOVERNMENT SERVICES			
2	60	That the Ministry pay the complainant the sum of $1,318.00 for his losses and legal expenses.	3, Rec. 34	That the Audit Act and the Financial Administration Act be amended to provide that when such a recommendation is made by the Ombudsman after all necessary and appropriate requirements of the Ombudsman Act have been adhered to by his Office, and when entirely accepted by the governmental organization, "a lawful authority" is created for such money to be paid by the governmental organization out of the Consolidated Revenue Fund. Further, that the Ombudsman's Office and the Ministry of Government Services resume their discussions on the merits of the Ombudsman's recommendation and that the results of these discussions are to be reported to the Select Committee.	The Ministry of Treasury and Economics has responded and proposed that the Ombudsman Act is the more appropriate statute for the amendment, since the purpose of the amendment directly relates to procedure under that Act. The Ministry proposed that the Ombudsman Act be amended as follows: "Where the Ombudsman, in a report under subsection 22(3), recommends to the governmental organization to whom the report is made that the governmental organization pay a specified sum to or for the benefit of the complainant to reimburse the complainant for an ascertainable financial loss suffered by him in the matter complained of, and where the Minister to whom a copy of the report is sent under that subsection accepts the recommendation at
			11, Rec. 4	That the Ombudsman Act be amended as follows: "Where the Ombudsman, in a	

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NUMBER	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF GOVERNMENT SERVICES (cont'd)			
				report under subsection 22(3), recommends to the governmental organization to whom the report is made that the governmental organization pay a specified sum to or for the benefit of the complainant to compensate the complainant for an ascertainable financial loss suffered by him, and where the Minister to whom a copy of the report is sent under that subsection accepts the recommendation at the amount mentioned therein or at a lesser amount acceptable to the Ombudsman and there is no authorization, apart from this section, for the payment of the sum so agreed on, such sum shall, where it is less than $1,000 and has been ascertained as required by this section, be paid by the Treasurer out of the Consolidated Revenue Fund on the authorization of the Minister concerned, and where the sum so agreed on is $1,000 or more, it shall be paid by the Treasurer out of the Consolidated Revenue Fund on the order of the Lieutenant Governor in Council approving such payment as is recommended by the Minister concerned."	the amount mentioned therein or at a lesser amount acceptable to the Ombudsman and there is no authorization, apart from this section, for the payment of the sum so agreed on, such sum may, where it is less than $1,000, be paid by the Treasurer out of the Consolidated Revenue Fund on the authorization of the Minister concerned, and where the sum so agreed on is $1,000 or more, it may be paid by the Treasurer out of the Consolidated Revenue Fund on the order of the Lieutenant Governor in Council approving such payment as is recommended by the Minister concerned." The amendment will be included in the package of amendments to the Ombudsman Act.
			12, p. 16	The Committee noted that the Attorney General has stated that recommendations for these amendments to the Act would be placed before Cabinet. The Committee expects to be dealing with them in the near future.	

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NUMBER	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF LABOUR			
		Workers' Compensation Board			
9	22	That the Appeal Board reconsider its previous decision with a view to granting the complainant a temporary supplement to his permanent partial disability, on the basis of a full consideration of the appropriate test for entitlement to such benefit.	10, Rec. 14	"The Workers' Compensation Board reconsider its decision of July 24th, 1980 and its decision of November 9th, 1981 with a view to granting the complainant a temporary supplement to his permanent partial disability award on the basis of a full consideration of all relevant evidence and factors."	The Board advised the Committee that it had accepted the recommendation in the Tenth Report and issued a decision dated September 20, 1983. In that decision, the Board purported to have considered all the relevant factors, but again denied entitlement to a supplement under section 43(5) of the Act. During the hearings before the Committee in the summer of 1983, the Ombudsman asserted that although the original language of his recommendation was lacking in precision, it was clearly his intention that the Board grant the complainant benefits. In the Ombudsman's view, the Board had continued to deny the recommendations of both the Committee and the Ombudsman. Following these deliberations, the Committee in its Eleventh Report made a further recommendation that benefits be awarded. After further discussions with the Ombudsman's Office, the Board granted the injured worker a supplement for one year amounting to approximately $950. The Committee must now decide if its recommendation has been implemented.
		That the Board provide reasons for its decision following the reconsideration.	11, Rec. 2	That the Workers' Compensation Board reverse its decision of September 20th, 1983 and grant the complainant a temporary supplement to his permanent partial disability award.	

APPENDIX B

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22(3)(d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
		MINISTRY OF EDUCATION					
2	47	That a more comprehensive insurance policy be made available to students, one which would provide compensation for injuries resulting in the loss of future earning power.	May 4, 1977	The Deputy Minister took steps to meet with insurance industry representatives regarding more comprehensive insurance for students.	3, Rec. 23	That the Ministry forthwith pursue its discussions with the insurance industry and other interested parties for the purpose of developing an appropriate contract of insurance in the indemnity type at a realistic premium which would adequately compensate a pupil for injuries sustained in the case of a pure accident as the result of participation in shop classes and in organized athletic activities.	The Ministry has amended s. 8(1)(i) of the Education Act as follows: "The Minister may (i) prescribe the conditions under which and the terms upon which pupils of boards shall be deemed to be employees under the Workers' Compensation Act, deem pupils to be employees for such purpose and require a board to reimburse Ontario for payments made by Ontario under that Act in respect of a pupil of the board deemed to be an employee of Ontario by the Minister." The Ministry is engaged in discussions with an insurance consulting firm in order to settle on feasible options for insurance coverage.
					11, Rec. 3	That recommendation 23 of its Third Report be implemented by the Ministry of Education by means of a policy of insurance on a province-wide basis before the end of 1984.	
					12, p. 9	The Committee urged the Ministry to move quickly and said it expected the recommendation to be implemented before its next hearings.	

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22(3)(d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
		MINISTRY OF GOVERNMENT SERVICES					
2	57	That the Public Service Superannuation Act be amended in order to eliminate all restrictions on the re-employment of provincial superannuates except where the nature of their re-employment is such that they resume contribution to the Public Service Superannuation Fund.	Aug 31, 1976	Executive Secretary of the Civil Service Commission agreed to recommend to Management Board of Cabinet changes in the Public Service Superannuation Act.	3, Rec. 24	That the Ministry table appropriate legislation in the Legislature during the current session removing the present restriction on the total current earnings of a provincial superannuate.	Amendment to s. 16 of the Public Service Superannuation Act is currently being prepared by the Benefits Policy Branch of the Civil Service Commission and is expected to be before the Legislature next session. The amendment has been delayed, with proposed changes to other pension plans, until the governmental review of the pension industry is completed.
					11, p. 20	The Committee made no recommendation but urged that Ministry and government table the amendment as quickly as possible.	It was subsequently decided not to proceed with the proposed amendment. This issue is seen as part of the larger issue of mandatory retirement age in light of the Canadian Charter of Rights and Freedoms. The effects of abolishing a mandatory retirement age are being studied by the Ministries of the Attorney General and Labour.
					12, p. 14	The Committee made no recommendation but commented that it is not clear why a projected analysis of mandatory retirement should halt progress on the Committee's recommendation; the Committee said it will	

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22(3)(d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
		MINISTRY OF GOVERNMENT SERVICES (cont'd)					
						continue to pursue the matter with the Ministry until the amendment is passed.	
		MINISTRY OF HEALTH					
3	40	That: 3) The Nursing Homes Act, 1972, be amended in order that provision be made for the successful candidate for the construction of a new home to make application for a conditional licence immediately upon the making of the award to him. This licence should be conditional on compliance with the terms of the proposal and any subsequent stipulations imposed by the Ministry prior to the granting of an unconditional licence.	May 4, 1977	Agreed to implement recommendation.	5, p. 32	The Committee considered this complaint for the purpose of following up with the Ministry as to the implementation of the Ombudsman's recommendation as set out at pages 177 and 178 of the Ombudsman's Third Report.	Necessary amendments have yet to be enacted. The Ministry proposed an interim arrangement whereby on any call for proposals the Ministry will undertake to the successful proposer that he be awarded a licence provided he constructs and establishes the home in accordance with the Nursing Home Act and regulations. This interim arrangement was acceptable to the Ombudsman.
					11, p. 21	The Committee accepted the interim arrangement on the understanding that the Act will be amended at some time in the future.	
					12, p. 15	The Committee noted that it is still awaiting amendments to the legislation and will continue to monitor the Ministry's response to its recommendation.	